SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| **PEOPLE OF THE STATE OF CALIFORNIA,**<br><br>**Plaintiff and Respondent,**<br><br>**v.**<br><br>**LOUIS RANGEL ZARAGOZA,**<br><br>**Defendant and Appellant.** | **No. S097886**<br><br>**(San Joaquin County Superior Court Case No. SP076824A)** |

**AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN JOAQUIN**

**The Honorable Thomas Teaford, Presiding**



***APPELLANT'S OPENING BRIEF***

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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# APPELLANT'S OPENING BRIEF

## I. STATEMENT OF THE CASE

On June 16, 1999, a felony complaint was filed in the San Joaquin County Superior Court charging appellant Louis Rangel Zaragoza[1] and his brother David Zaragoza with violating section 187[2] (murder), and the

[1] Due to the substantial number of family members in the Zaragoza and Gaines families, some with overlapping first names, appellant will generally refer to all parties by both their first and last names, except for Louis Rangel Zaragoza, who will be referred to as "appellant."

[2] All statutory and section references are to the California Penal Code unless otherwise stated. The Reporter's Transcript will be abbreviated as RT; the Clerk's Transcript as CT; and the augmented transcripts will be referred to as either ACT or ART.

special circumstances of murder by lying-in-wait (§ 190.2, subd. (a)(15)), and murder committed during the commission of a robbery (§ 190.2, subd. (a)(17)). Both defendants were also charged with violating section 211 (second-degree robbery), and appellant was charged with violating section 12022.5, subdivision (a) (use of a firearm in the commission of a felony), and section 12022.53, subdivision (o) (intentional and personal discharge of a firearm). Appellant was also charged with violating section 667.5, subdivision (b) in regard to a conviction in March of 1981 for receiving stolen property, for which he served a prison term and failed to remain free for five years after release. Appellant and David Zaragoza were each further charged with a special allegation for enhancements under section 969 (prior prison term). David Zaragoza was charged with prior prison terms for a robbery conviction (§ 211) in 1983, and an assault conviction (§ 243) in 1993. (1 CT 1-6.)

A preliminary examination was held on August 16 and 17, 1999. (1 CT 79-81.) Appellant and David Zaragoza were bound over to superior court. On August 31, 1999, an information was filed in the San Joaquin County Superior Court charging appellant and David Zaragoza with violating section 187 (murder), but charging only appellant with the special circumstances of murder by lying-in-wait (§ 190.2, subd. (a)(15)), and

robbery (§ 190.2, subd. (a)(17)). Both were charged with violating section 211 (robbery), and appellant was charged with violating section 12022.5, subdivision (a) (use of a firearm in the commission of a felony), and section 12022.53, subdivision (o) (intentional and personal discharge of a firearm). Appellant was also charged with a special allegation for enhancement under section 969 (prior prison term) and section 667.5, subdivision (b) (receiving stolen property). (3 CT 390-397.)

On December 6, 1999, David Zaragoza's attorney, Andrew Quinn of the San Joaquin County Public Defender's office, expressed doubt as to David's competence to be tried. Pursuant to section 1368, proceedings were then suspended for David Zaragoza. (1 RT 53; 2 CT 445.) On January 24, 2000, the prosecutor asked for a jury trial to resolve the question of whether or not David Zaragoza was competent to stand trial. A trial date to resolve this question was set for April 25, 2000. (2 CT 470.) The date was continued to May 9, 2000. (2 CT 472.)

On May 22, 2000, David Zaragoza filed a motion to disqualify the Honorable Terence Van Oss, who had presided over the preliminary hearing and was assigned these cases in superior court. The motion stated that counsel had received materials from the prosecutor indicating that Judge Van Oss had been the prosecuting attorney for David Zaragoza's prior

convictions for robbery and assault. He had also prosecuted appellant and his codefendant Darrel Lee Thomas on a murder charge stemming from a 1975 robbery and shooting of a cab driver, and had vigorously cross-examined appellant, then a juvenile, who testified that he had shot the cab driver alone.

Judge Van Oss observed that while there might be a problem with appellant's case, he did not see any problem with his presiding over David Zaragoza's case. (2 RT 447-448.) The motion was filed after he decided to wait to decide until after the resolution of David Zaragoza's competency issue to decide whether to recuse himself. (2 CT 522-540.) The motion was assigned to the Honorable Richard Turrone, who granted the motion on May 25, 2000. (3 CT 626.) The Honorable Thomas Teaford was then assigned to this case. (3 CT 634.)

On June 7, 2000, the prosecutor filed notice of intention to seek the death penalty for both David Zaragoza and appellant. (3 CT 632-634.) David Zaragoza's competency trial began on June 14, 2000. (3 CT 639-640.) On July 28, 2000, the jury found him incompetent. (3 CT 835-840; 16 RT 4059-4060.) He was ordered to remain in Atascadero State Hospital until such time as he might return to competence. (4 CT 1000-1002.) Appellant therefore proceeded to trial alone.

On October 16, 2000, appellant filed a motion to suppress evidence seized from his residence. (4 CT 1028-1036.) An amended information styled by the prosecution as a "third strike case" was filed on November 20, 2000, charging appellant and David Zaragoza as before. (4 CT 1044-1051.)

Jury selection for appellant's trial began on December 5, 2000. Opening statements were made on January 23, 2001. (23 RT 5909-5926, 5926-5946.) Final arguments took place on February 14 and February 15, 2001. (30 RT 7793-7977.) The jury retired to deliberate as to guilt in the late afternoon of February 15, 2001, and deliberated all day on February 16, February 21, and February 22, 2001, frequently asking for testimony of witnesses to be reread and to view trial exhibits. (5 CT 1340-1341, 6 CT 1518-1530). At 11:05 am on February 23, 2001, after over 20 hours of deliberations, the jury returned verdicts of guilty as charged on all counts, and found true all the special circumstances and enhancements. (6 CT 1531-1542; 31 RT 8090-8109.)

Appellant's penalty phase trial began on March 13, 2001. (7 CT 1798-1801; 32 RT 8328 et seq.) The prosecution put on evidence of appellant's prior crimes, and testimony from the victim's family regarding their loss. Appellant testified in his own behalf, and presented the testimony of family members, jail inmates and guards, and a social worker.

After rebuttal and surrebuttal, closing arguments took place on March 30, 2001. The jury began deliberations on that same day. (7 CT 1868-1869; 36 RT 9552 et seq.)

The jury continued to deliberate on April 2, April 3, April 4, and April 5, 2001. After four and one-half days of deliberations, over at least 16 hours, the jury returned a verdict of death on the morning of April 6, 2001. (37 RT 9678-9685; 7 CT 1905, 1908, 1911, 1913, and 1914-1916.)

Appellant filed a motion for a new trial on May 2, 2001, asking that the guilt verdict be set aside, or that the penalty be modified to life without possibility of parole. (9 CT 2508-2539.) The prosecution filed an opposition to this motion on May 15, 2001. (9 CT 2568-2591.) On May 22, 2001, the trial court rejected appellant's motions, and sentenced him to death. (10 CT 2663-2669.)

Pursuant to section 1239, this appeal is automatic.

## II. STATEMENT OF FACTS

### A. Guilt Phase

William Gaines and Mary Gaines are the father and mother of the decedent David Gaines. In June of 1999, the Gaines family owned Gaines Liquors at 2211 West Alpine in Stockton, California. The three of them lived at 1122 Cameron Way in Stockton. (26 RT 6780-6784.)

William Gaines worked regular hours and came home directly from the store every evening around the same time, a few minutes after 11:00 p.m. (25 RT 6431-6432.) He testified that on *rare* occasions, he brought home his profits for the day in a bag or sack. There was a safe at the store, and he usually made deposits at a nearby bank in the morning. (24 RT 6242.) William Gaines would normally come home by himself. Sometimes he would be accompanied by his son David, who drove his own car. (24 RT 6241.)

David Gaines also worked there, but his hours were more erratic. He worked until 8:00 p.m. during the week, and worked until 11:00 p.m on Friday and Saturday; sometimes he would miss work altogether because of his efforts to get a pilot's license. (24 RT 6086-6087, 6299.)

Howard Stokes, a neighbor of the Gaines family, lived at 1155 Cameron Way. On June 7, 1999, he was out in the nighttime walking his

dog when he encountered someone walking towards the Gaines residence. The man had come out of a green minivan on the corner of Cameron and Gettysburg to the east, and walked towards the Gaines home. Mr. Gaines then pulled up. His car lights shone on the man, who stepped behind a tree; Mr. Stokes was not sure if the man was relieving himself or just hiding from the lights. Then, the man walked away, continuing westbound on Cameron Way. (25 RT 6431.)

Mr. Stokes was walking on the Gaines's side of the street and the man was walking across on the north side of the street. As they were walking, the man asked Mr. Stokes, "What is the name of your dog?" Mr. Stokes did not answer; he was worried. After walking parallel to the man for a time, Mr. Stokes crossed the street, careful to wait for the man to pass, and went home. (25 RT 6466-6467.)

Mr. Stokes described the man as of stocky build, about five feet, six or seven inches tall, probably Hispanic. (25 RT 6433.) The most striking feature about him was his face: he had no facial hair, but his face was dark and seemed painted, or coated with something that "just didn't look natural." He told Deputy Daniel Anema, who interviewed him within an hour of the crime's commission (but four days after the reported encounter), that the man's face seemed painted black. (25 RT 6434; 28 RT 7191-7192.)

On June 11, 1999, both William Gaines and David Gaines worked into the late evening. They returned from the liquor store to their house in separate cars shortly after 11:00 p.m. As usual, William Gaines parked his station wagon in front of the house on the street (it was too long to fit into the garage), while David Gaines pulled into the garage. David's normal practice was to go on into the house through an interior garage door. (24 RT 6243, 6285-6286.)

As he got out of the car that night, William Gaines retrieved a sack holding a Pyrex bowl that had contained his lunch. It was not unusual for his wife to prepare something for him or David to eat. When he turned, he was attacked by a man who grabbed the sack from him and punched him. (23 RT 6065, 24 RT 6246, 6328.)

William Gaines testified that when he was punched, he dropped to one knee, and called out, "David," to which his son responded by yelling, "hey," or "stop." (28 RT 7402.) Soon after William Gaines called for his son (24 RT 6247), he heard shots and crouched. He was watching his assailant flee when he heard shots being fired; the assailant was 20 to 30 feet away. He ducked, and then saw two people fleeing, about 50 to 100 feet away, one about 10 feet behind the other. (24 RT 6252-6253, 6294-6295.)

William Gaines went over to his son, who was lying in their driveway halfway between the open garage door and his car parked on the street. David Gaines had suffered four bullet wounds fired at close range into his head and chest; a fragment was found in his wrist. The presence of soot and other gunshot particles around the entry wounds indicated that David Gaines was close to his assailant and facing him when shot. (25 RT 6579, 25 RT 6590, 26 RT 6752-6753, 6579.) William Gaines testified that he did not see any muzzle flash from the gunshots that killed David Gaines. (24 RT 6253.) The paths of the bullet wounds had a downward angle, suggesting that David Gaines was significantly lower than his assailant, or was falling when shot. (25 RT 6594).

Of the four bullets that hit David Gaines, three were independently fatal: one shot to the head, and two contact wounds to the chest. One bullet exited his body, landing on the ground to the east of the driveway, on neighbor David French's lawn. (23 RT 6005, 9 CT 2539; 25 RT 6599-6610.) A self-defense cannister stained with blood was beside him. His watch was shattered, with pieces of it spread around him; the face of the watch was later found across the street. (24 RT 6129-6131, 6142, 6179-6185, 25 RT 6579).

Neighbors, including David French who lived directly to the east of the Gaines family, gathered outside. Mr. French went out immediately after hearing gunshots (23 RT 6003), and made the 911 call at 11:14 p.m. (23 RT 5590-5594.) He did not see anyone running away, although the 911 call describes two people; Mr. French testified that he relayed the information about two people based on what he heard from Mary Gaines and Carol Maurer, a neighbor who lived across the street. (23 RT 6004.)

Deputy Gary Sanchez of the San Joaquin County Sheriff's Department was patrolling in North Stockton on June 11, 1999, when he received a dispatch call to a Cameron Way address sometime after 11:00 p.m. Shots had been fired and a man was down. (24 RT 6099-6100.) He arrived within a couple of minutes, and saw the body of David Gaines in the driveway. Efforts to find a pulse were fruitless. Medics arrived shortly thereafter and reported to him that David Gaines was dead. (23 RT 6000.)

Deputy Jeff McLean arrived in a separate patrol car. (24 RT 6089.) He took on the job of securing the crime scene and gathering evidence while Deputy Sanchez got a quick description of what happened from William Gaines in order to broadcast to other officers a description of the suspect. (24 RT 6106-6107.) William Gaines was calm, and fully able to

answer Sanchez's questions. (24 RT 6112). He never told Sanchez that there was more than one suspect. (24 RT 6113.)

Detective Jerry Alejandre was one of the lead investigators on this case and sat with the prosecutor throughout the trial. (24 RT 6312.) He was sent to the crime scene shortly after the shooting, and arrived a little after midnight. (24 RT 6326.)

When Detective Alejandre arrived, he walked through the crime scene with William Gaines and then interviewed him. According to his notes of that interview, conducted within two hours of the crime, Mr. Gaines told him that after he got out of the car, he was met by a stocky Hispanic male about 5'4", who struck him on the left side of his face and knocked him to the ground. After the man struck him, he grabbed the paper bag William Gaines had in his hand and yanked it from him.

As William Gaines was falling to the ground he yelled for his son to help him. As he got up, he heard David Gaines yell, "Hey." William Gaines then heard gunshots, and as he looked down the street eastbound, he saw the man who had struck him running away. (24 RT 6326-6329.) At no time during that interview did Mr. Gaines ever tell the detective that he saw more than one suspect. (24 RT 6329.) In fact, Mr. Gaines told him that he did *not* see anyone else. (24 RT 6331.)

Carol Maurer, an elderly neighbor of the Gaines family, lived at 1105 Cameron Way, across the street from the Gaines residence. She testified that on June 11, 1999, she went to bed around 11:00 p.m., and had turned off the lights and was on her way to sleep — but not yet sound asleep — when she heard the voice of William Gaines calling out the name of his son David, followed by several gunshots. (23 RT 6011, 6032-6033.) When she heard the shots, she got up and looked out her bedroom window.

She testified that she saw two young men close to each other running away east towards Gettysburg Street. Her view was cut off by her garage, which protruded towards the street on the east side of her house. (23 RT 6013-6014.) She thought that the one in back was wearing white, and it looked like he was wearing a hat. She could not recall anything about the other's clothing. When she saw Mary Gaines come out of her house, Ms. Maurer put on a robe and went outside, joining other neighbors who had come out. (23 RT 6014-6015, 6025-6026; Exhs. 41 and 42, pictures of Ms. Maurer's home, and 323, a diagram of her house and garage, identified at 23 RT 5895-5897, shown to Ms. Maurer at 23 RT 6011, 23 RT 6031, and 23 RT 6027, and entered into evidence at 29 RT 7555.)

When Ms. Maurer was interviewed by Deputy Anema shortly after the incident, she said that she had been asleep, and was awakened by

gunshots. (28 RT 7193.) She heard a person by the name of David yell something; when she looked out her window she saw two young white males running together eastbound. (28 RT 7194-7195.)

The prosecutor questioned Detective Anema regarding whether Ms. Maurer might have said she heard a person yell, "David." The detective had to rely on his notes, which indicated that she reported hearing a person named David yell. He added, "She was very shook up when she was talking. It was hard for me to get information out of her," and affirmed that she was shaking uncontrollably and clutching her cat at the time she was interviewed. (28 RT 7195.)

Cindy Grafius lived at 1034 Cameron Way, four houses to the east on the same side of the street as the Gaines residence. She was watching television when she heard four pops like firecrackers outside. She went to her kitchen window and climbed on a bench to look out. (23 RT 6035; see Exh. 8, 323, and 325-328, a diagram of the neighborhood and photographs of her house, and of the view from her window, shown to Ms. Grafius at 23 RT 6045-6047, admitted into evidence at 23 RT 6057.)

She saw a single figure running. He was within her sight for maybe three seconds. She did not notice whether he was carrying a bag. (23 RT 6037-6038, 6049-6050.) She thought maybe kids were setting off

firecrackers, so she went outside to see what was going on. No one was there. After walking out to the middle of the street and looking up and down, she went inside and on to bed. (24 RT 6041-6042.)

At some point later that night, William Gaines noticed that his keys, as well as Lotto tickets and other papers he kept in his shirt pocket, were no longer there. He went outside by his car, and gathered papers from the ground that had fallen near where he had been struck. (24 RT 6281-6282.) He initially thought they were all his, but when he looked at them the next morning he saw that they included, in addition to several of his business cards, papers apparently belonging to a man named David Zaragoza. One of the papers was a notice of a court date on June 10, 1999. William Gaines promptly called the police. (24 RT 6275, 6300, 6323.)

David Zaragoza was easily located. In June of 1999, he lived in a group home at 357 West Fifth Street in Stockton. The group home was run by James and Stella Allen. David Zaragoza also had a roommate named Ernie Williams. (27 RT 7098, 7147.)

David Zaragoza had a long history of both mental illness and criminal activity, and had been in and out of prisons, jails, and mental hospitals for decades. The papers William Gaines had picked up had David Zaragoza's fingerprints on them. (24 RT 6342-6343.) The papers showed

that he had been arrested for possessing drug paraphernalia, and maintaining a house where crack cocaine was being used. David Zaragoza had met with his lawyer about these charges on June 10, 1999. At the time of the homicide, he was out of jail on his own recognizance. (24 RT 6355-6356.)

David Zaragoza was interviewed by Detectives Alejandre and Wuest on June 12, 1999. The interview was surreptitiously recorded. In the interview, David denied knowing anything about the crime, and said he had been out alone, and gotten back to the group home at 9:45 p.m. (29 RT 7524; 36 RT 9429.)

James Allen was manager of the group home where David Zaragoza lived. Mr. Allen testified that David Zaragoza went out sometime in the evening of June 11, 1999, and came back home during the Channel 13 newscast, or between 10 and 11 p.m. (27 RT 7110.) David's roommate, Ernie Williams, could not remember anything about the night of June 11, 1999, nor could he remember talking with a detective. However, he testified that whatever he said when interviewed was true. (27 RT 7149.) According to Detective Wuest, who interviewed Mr. Williams at 11:00 a.m. on June 12, 1999, Williams told him that David came home the night before

sometime during the David Letterman show, which was an hour-long show that ran from 11:00 p.m. to midnight. (28 RT 7318.)

On the morning of June 11, 1999, David had visited therapist Kim Kjonaas, who noted that he was "stable." (27 RT 7142.) On Sunday morning, June 13, 1999, David went back to Ms. Kjonaas. He asked for medication, and to be admitted to the PHF Unit, the inpatient mental hospital for San Joaquin County. When told he would not be admitted, he defecated and smeared feces on himself. Nevertheless, he was still refused; the admissions counselor testified that many people resort to extreme manipulation in order to be accepted as full-time patients. (27 RT 7146.)

Appellant was contacted and interviewed by the police on June 13, 1999. He lived then with his sister Ophelia "Nina" Koker and her husband John Koker in their house at 429 South Airport Way in Stockton.[3] Appellant worked as a welder for Pulver and Genau, a metal fabrication company in Tracy, about 20 miles from Stockton. His mother, Yolanda Tahod, shared her car, a light-colored Honda, with him so he could have a means of transportation to and from work. He typically got up at 3:00 a.m., arrived at work at 5:30 a.m., half an hour early, and returned home in the

[3] Nina Koker worked as a supervisor in a laundry. John had suffered a massive stroke in 1997 that deprived him of his memory and ability to speak. (26 RT 6829, 27 RT 6991-6992, 7032.)

afternoon. His time cards for the week of the crime were entered into evidence. (See Exh. 319, identified at 23 RT 5896, and testimony of Operations Manager Daniel Romjue, 26 RT 6666.)

Appellant told Detective Alejandre that on the night of June 11, 1999, his brother David Zaragoza called his sister and asked to spend the night at her house. She said it was all right if appellant would be there. He agreed; he was tired and didn't plan to go anywhere that night. The night before, appellant had attended a high school graduation with his friend Antoinette Duque, and had not gotten home until 10:30 or 11:00 p.m. (7 CT 1995-1996; 27 RT 7077-7079.)

Appellant drove his mother's car to David Zaragoza's residence and picked him up. After they returned, he asked David Zaragoza to rub his feet, which were sore from a full day of standing; his brother was always willing to do that. As David Zaragoza rubbed his feet, he fell asleep. (See Exhs. 143 and 143a, tape and transcript of interview of appellant on June 13, 1999, played for the jury at 26 RT 6857-6849; 7 CT 1991-1993.) When he woke up, David Zaragoza was gone. He went back to sleep, and woke up as usual at 3:00 a.m. to go to work. (7 CT 2007-2008.)

His boss had not gotten a chance to tell appellant on Friday that he would not be needed on Saturday, June 12, 1999, so appellant showed up

for work at the regular time. (26 RT 6662.) Upon learning he was not needed, he returned to town and went to the laundry where Nina worked to pick up drapes for his brother Reynaldo. He was in his work clothes when he came by, sometime before 9:00 a.m. when Nina got off work. (27 RT 7032-7035.) He took the drapes over to Reynaldo's house and spent 90 minutes or so visiting with Reynaldo. (28 RT 7170.)

Billy Gaines, David Gaines's nephew, also worked at the Gaines liquor store. He testified that a man with a distinctive mustache came into the store in the early afternoon on June 10, the day before the murder, and asked about the video camera in the store. This happened some time before David Gaines came to work at 3:00 p.m. and activated the camera. (25 RT 6494-6497, 6504-6505.)

When shown a mug shot of appellant (People's Exh. 50, admitted into evidence at 27 RT 7153), Billy Gaines identified him as the man who had asked about the video camera, and when interviewed later that day by a television station and shown a picture of appellant, he immediately said, "that's the son of a bitch." (26 RT 6817, 30 RT 7911-7912.) At the time of his purported appearance in the liquor store, however, appellant was actually working in Tracy. He punched out that day at 4:32 p.m. (30 RT 7912.)

Stanley Monckton was a neighbor of the Gaines family. He was asleep at the time David Gaines was shot, but he went outside shortly after it happened. He called the police after seeing appellant being arraigned on television, four days after the homicide. (25 RT 6482). He testified that he saw a man with a "Foo Manchu" mustache driving a light-colored foreign car slowly down Cameron Street on the day after the murder, around 11:00 a.m. or noon; a man who "didn't belong in the neighborhood." (25 RT 6480, 6485-6486.)

Case investigators found no physical evidence to link appellant to the crime scene, and nothing on his person or in his automobile to link him to the killing of David Gaines. The Pyrex bowl and lid, taken from William Gaines and identified by Mary Gaines as theirs, was found at the residence appellant shared with his sister, her husband and, on occasion, David. (23 RT 6063, 25 RT 6539.) The bowl was found in a Grocery Outlet bag, not the bag it was in when it was stolen. (25 RT 6528). It was in a garbage can located beside the house. The garbage had been collected on Friday morning, June 11, as usual. The bowl's lid was located in a coffee can, also found in the garbage, along with an empty pack of Marlboro Light cigarettes, Nina Koker's brand. Nina Koker testified she had used the lid as an ashtray. (27 RT 7026.)

In addition, a receipt from a Jack in the Box located near the Gaines residence was found in the garbage can outside the Koker house, along with the bowl. The Jack in the Box receipt was time stamped to 12:03 a.m. on June 12, 49 minutes after the time of the 911 call on the night of the murder.[4] (26 RT 6685.) The receipt showed that only one Jumbo Jack and water had been ordered. But the Jack in the Box bag contained french fries and ketchup — items not included on the receipt — as well as a package of Marlboro Lights. (26 RT 6693, 6716.)

Nina Koker testified that she spent the evening of June 11, 1999, with her then-new boyfriend, Raymond Padilla. She went to the Pacific Avenue Jack in the Box in his car at about midnight on the night of the murder and ordered french fries and a drink with her main course, like always. (27 RT 7016). Mr. Padilla testified to the same effect. (29 RT 7506 et seq.)

Ms. Koker was impeached with testimony demonstrating that she was locked out of her car that evening, and had to call a locksmith at 11:51 p.m., 12 minutes before the time stamped on the Jack in the Box receipt. The locksmith's work concluded at 12:08 a.m. (26 RT 6672-6673.)

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[4] The Jack in the Box branch was located at 6200 Pacific Avenue, on a main thoroughfare, 0.6 miles away from the Gaines residence. (26 RT 6782.)

David Zaragoza regularly visited San Joaquin County Mental Health, and lived off of vouchers that he acquired from the county. Family members testified that he had not been seen driving since the mid-1980s; his mother Yolanda Tahod did not allow him to drive her car. (24 RT 6365-6366, 26 RT 6735, 28 RT 7172-7173.) The Gaines home address was listed in a phone book for the year 1999, which was available in the San Joaquin County library in Stockton. (28 RT 7304.)

The group home where David Zaragoza lived was 7.5 miles from the Gaines residence, and 2.3 miles from the Koker residence. The distance between the Gaines residence and the Koker residence was 6.1 miles. (26 RT 6782.)

No fingerprints from appellant or anyone else were found on the Jack in the Box items or the Pyrex bowl. Extensive gunshot residue tests were performed on appellant, his watch and his clothing. Nothing was found. (24 RT 6225-6226.) Even though David Zaragoza was contacted by police within a few hours of the murder, case investigators did not perform any gunshot residue testing on him or his clothing. (17 RT 4384.) Yolanda Tahod testified that she left the car with appellant after church on Friday, June 11, 1999, which got out at 9:00 p.m. (25 RT 6396.)

No part of this car that was allegedly used to get to and leave the site of the murder was analyzed for fingerprints. Swabs taken from the car for bodily fluids showed no results. (27 RT 7094-7095, 28 RT 7328.) The gun used to shoot David Gaines was never found. Detective Wuest testified that he "looked around" David Zaragoza's room on June 12, 1999, the day after the crime, and "moved a few boxes around" outside the group home where David Zaragoza lived. (27 RT 6973-6974.)

Appellant presented to the jury an animated reconstruction of the crime, along with photographs, illustrating the defense theory that the crime was committed by one person, David Zaragoza. (28 RT 7177-7186, 7209 et seq; Exh. 300a, marked for identification at 28 RT 7164, admitted into evidence at 29 RT 7541.)

The prosecution relied on David Zaragoza's mental impairments to support its theory that he could not have committed this crime alone. He was examined by Dr. John Chellsen, a court-appointed psychologist. Dr. Chellsen testified that David Zaragoza had paranoid schizophrenia, in unstable remission, and abused multiple drugs. He said that David Zaragoza could not formulate hypothetical situations, or evaluate choices. (25 RT 6402, 6409.) However, Dr. Chellsen was not asked to evaluate his

criminal capacity to commit the crime at bench, and he expressly stated that he had no opinion on that topic. (25 RT 6427-6428.)

During his 90-minute evaluation of David Zaragoza, Dr. Chellsen spoke a little with him about his prior crimes, including his robberies, but did not explore them in detail; David Zaragoza would not speak about the details of his criminal record. (24 RT 6411, 6425.) Dr. Chellsen acknowledged that shooting someone is fairly concrete thinking. (24 RT 6415.)

Dr. Kent Rogerson, a psychiatrist on the San Joaquin Superior Court panel, was retained to evaluate David Zaragoza during his competency trial. (28 RT 7435.) He testified that David Zaragoza had very concrete thinking (28 RT 7440), and diagnosed him as having a DSM Axis I diagnosis of schizoaffective schizophrenia with bipolar type, exacerbated by polysubstance drug abuse, and an Axis II diagnosis of borderline intellectual functioning. (28 RT 7443.) He also described PET-scan indications that David Zaragoza's brain had reduced activity in the area of executive functioning. (29 RT 7492.) Dr. Rogerson could not say what the functioning of David Zaragoza may have been around June 11, 1999, because at that time he was taking prescribed drugs very erratically, and was taking street drugs as well. (29 RT 7493.)

David Zaragoza had been diagnosed with anti-social personality disorder at least 10 times over the previous 20 years. (28 RT 7447.) Dr. Rogerson described some of David Zaragoza's child-like attempts at manipulation. (28 RT 7448-7450.). He also depicted David Zaragoza's previous criminal involvement and activity in crimes of which he had been convicted and sent to prison (29 RT 7471-7482), and testified that David could "definitely" react violently if he thought someone was threatening him. David Zaragoza was capable of great violence. (29 RT 7482, 7484-7485.)

### B. Penalty Phase

#### 1. Respondent's Evidence In Aggravation

The prosecution presented testimony by the decedent's parents, two brothers, and sister-in-law about the impact of his death on them. (33 RT 8616 et seq.) Evidence was also presented of appellant's juvenile charges: In 1975, when appellant was 15 years old, he and 19-year-old Darryl Lee Thomas tried to rob a taxi-cab driver, Bennie Wooliver; Thomas shot and killed Wooliver while he was driving. (32 RT 8498.) Later that same night appellant and others tried to rob a 7-Eleven store. Appellant turned and fired shots as they were leaving, one of which wounded clerk Dale Sym. (32 RT 8502.)

He escaped that night, but his friends in the car were captured. The next day, the police called appellant's mother. The day after that, he surrendered to the police, and gave a lengthy statement describing his day of criminal activity. (32 RT 8484-8500.) Appellant was sentenced to the California Youth Authority (CYA), and released five years later.

Shortly thereafter, appellant was arrested along with several others while driving a brown Cadillac. Police searched the car, finding several weapons in the trunk and under the car seats, as well as stolen items. Appellant was convicted of possessing stolen property, and sent to state prison for a little over a year in March of 1981. (32 RT 8461-8466.)

Appellant was released from state prison on March 25, 1982. (7 CT 1969.) Six weeks later, he was arrested for participating in a foiled bank robbery that led to his incarceration in federal prison for 17 years.

On July 5, 1982, the FBI received a tip about a plot to rob a Stockton bank on the following day. The car to be used and the four individuals involved were identified by the informant. On the day in question, FBI agents and Stockton police officers were placed throughout the bank and on neighboring rooftops. The car drove up with four robbers inside. One of them, Albert Dimentrio Leon, came into the bank, yelled "this is it!" and pulled out a hand gun. He shot it into the air, and was promptly shot and

killed. Before he died, he fired shots, and wounded an FBI agent. (33 RT 8373-8374,8384-8385.)

Two others left the car and ran toward the bank, but turned and ran away when they heard the shots. Appellant, one of these, carried a sawed-off shotgun. He was arrested by his car outside the bank, with the shotgun by his side. Shots were fired by FBI agents and members of the Stockton Police Department. One of the FBI officers involved testified that appellant pointed the gun in the officer's direction, then turned and ran. The FBI officer could not tell whether appellant pulled the trigger at that time. When the gun was inspected later, there was a bullet in place, and it appeared that the gun had malfunctioned. (32 RT 8421-8422.)

### 2. Appellant's Evidence in Mitigation

Valencia Pinto, appellant's elder sister, worked as a housekeeper at the Equity Residential condominiums. She was a single parent with three children. The oldest, a boy, was then in the army; her two daughters both lived with her. (33 RT 8681-8682.) She is the oldest of six children; in birth order, there were Valencia, Reynaldo, David, appellant, Nina, and Mona. (33 RT 8682-8683.)

Ms. Pinto testified about appellant's turbulent upbringing. Their father, Louis Sr., was physically abusive and beat Valencia, appellant and

David "all the time." (33 RT 8684-8685.) In particular, their father picked on appellant, who was a cute, curly-haired boy as a child; Louis Sr. called him a sissy and a queer. (33 RT 8686.)

Louis Sr. was extremely sensitive to noise; the kids would be afraid to move sometimes because the slightest sound would send their father into a rage, and he would beat everyone around him. An alcoholic, Louis Sr. began to show signs of mental illness when appellant was a young child. One evening, his father started digging a hole in the back yard which he said was a grave. At some point Valencia called her aunt, who called the police. Louis Sr. was ultimately taken away by the police and hospitalized. (33 RT 8689-8690.)

The children's mother was frightened of her husband. She did nothing to protect them until she fled with them all to Stockton from Los Angeles, when appellant was seven years old. A couple of months later, Louis Sr. came to Stockton and kidnapped all the children. He was stopped by police on the freeway as he was driving them back to Los Angeles.[5] (33 RT 8689-8691.)

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[5] During appellant's trial, the body of his missing father washed up in the Los Angeles harbor. (24 RT 6073.) The trial was briefly delayed so that family members could attend his funeral. (24 RT 6073, 26 RT 6789, 6882.)

Ms. Pinto was very pleased with appellant's conduct after his release from prison: He found a junior college training program on his own, learned a skill (welding), and got a good job. Ms. Pinto testified to her brother's desire to form a cohesive family unit after release from federal prison. (33 RT 8693-8694.) Ms. Pinto saw the explosive anger in her brother David Zaragoza as similar to that of her father, though not as frightening. (33 RT 8713.)

Reynaldo Zaragoza, appellant's oldest brother, worked at Super Store Industries in Lathrop. He had been married for 20 years, and was the father of one daughter. He described his childhood and their family in terms very similar to the description by Ms. Pinto. (33 RT 8713-8715.) He remembered appellant as a young man being under the bad influence of an older man, a counselor named Reuben Arrellano, when he got out of CYA; he recalled appellant being arrested while driving Arrellano's Cadillac. (33 RT 8717-8719.)

Reynaldo stayed in touch with appellant during his years in federal prison, and was there to pick him up when he was released. He was very impressed with how well he was doing, organizing his life, getting a good job, despite being subjected to what Reynaldo felt was undue harassment by federal parole officers. (33 RT 8719-8720.) Appellant was enjoying

himself; he liked his nieces and nephews, spent much time with them, and was "happy as a lark." (33 RT 8721.)

Appellant's mother, Yolanda Tahod, lived in Stockton, along with most of her children. She described her years with Louis Sr., his increasing abuse of the family, mental deterioration, and finally, commitment to a mental hospital. (33 RT 8741-8746.) She described breaking free of him and taking her children to Stockton. (33 RT 8747.) There, she met and married Albert Tahod, a man who was never abusive, but who was almost always drunk. (33 RT 8752.)

When appellant came home from federal prison, Ms. Tahod became close to him. Ms. Tahod described the renewal of their relationship, his joining her church, their sharing a car. (33 RT 8755.) There were a great number of family events and outings, and appellant was an enthusiastic participant. He enjoyed his job, and was very pleased that the boss liked him and his work. She could not see any signs at all in him of discontent. (33 RT 8758-8760.)

Prison minister Harry Goertzen testified about appellant's active involvement with and growth from Bible studies while in the San Joaquin County jail. (34 RT 8981.) Donald Halleck worked with Mr. Goertzen, and testified about appellant's recruitment of other prisoners into a Bible study

group. (34 RT 8995.) Jail guard Brian Doty testified that appellant would lead Bible study inside the pod, despite the low status in jail attached to religious activities. (34 RT 9003.)

Several prisoners testified about the valuable assistance appellant had given them, and about his good influence on them while they were in jail. (See testimony of Michael Gotschall, 34 RT 9032 et seq.; Leonard Lucero, 34 RT 9007 et seq.; Glenn Holsome, 34 RT 9012 et seq.; John Patter, 34 RT 9017 et seq.; Paul Crutchfield, 34 RT 9024 et seq.; Donald Knowles, 34 RT 9052 et seq.; and Mike Buccieri, 35 RT 9075 et seq.) The prosecutor thoroughly cross-examined each inmate on his prior criminal record.

Antoinette Duque testified that she had been appellant's girlfriend when he was in the Youth Authority. They reconnected after his release from federal prison, and dated each other from January to May of 1999. She backed away from him because he wanted to start a family as a way of redirecting his life, while she did not want to have a child at her age. Nevertheless, she maintained a friendship with appellant thereafter, and testified to her high regard for him. They had been together on the evening of July 10, 1999, attending the high school graduation of her daughter's boyfriend. (34 RT 9038-9046.)

Edward Tahod was appellant's youngest brother. He testified that after appellant's release from prison in 1998, he spent much time with appellant, who often came by to visit and take his nephews and nieces out to play, especially when he was attending Delta College. He would take the kids over to the ball park and playground across the street from his house, ride bicycles around the neighborhood, and buy them treats at nearby stores. Tahod took appellant to a fitness gym where he was a member and the two of them would work out. Appellant's visits slowed down after he got his job in Tracy. (33 RT 8806-8808.)

Tahod had offered to take out a car loan for appellant from his 401k plan, and had already made the application; with his job in Tracy his brother would have no problem paying him back. (33 RT 8807-8808.)

Appellant testified on his own behalf. He testified about the crimes he had committed as a 15-year-old (34 RT 9081-9103) and the bank robberies he committed that led to his lengthy term in federal prison. (35 RT 9104-9122.) He had testified falsely that he had done the shooting for which Darrel Thomas had been convicted because Thomas's family had asked him to do so; as a 15-year-old, he could only be sentenced as a juvenile. (35 RT 9102-9103.)

He spent 16 years in various federal prisons before being released in 1997. Shortly after his release he found work as a landscaper with Joe Montez. A few weeks after appellant began work, Montez had to pull his truck into a garage because the truck had started to lose power; the garage happened to be owned by Alex Ovando's father.[6] While they waited for service, Alex drove up, followed by his parole officer. Appellant was ultimately returned to prison for a parole violation — being in the same place (a car garage) as Alex Ovando. (34 RT 8874-8875, 35 RT 9125, 9220-9221.)

Appellant described a very influential meeting he had in prison with his family. His brother Eddie came, along with his mother and sister Valencia. Eddie, whom appellant remembered as a little boy, now was a grown man with a child of his own and another on the way. Appellant promised his family that he was not going to live the criminal life any more, and resolved to start a family of his own. He asked his sister to send him the DMV packet about three months before his release. The day after his release he went straight to the DMV, took the written test, and passed.

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[6] Alex Ovando was one of appellant's two codefendants on his Stockton bank robbery charge. (32 RT 8419.)

When he passed the driver's test the next day, he got his first ever legal driver's license. (35 RT 9124-9127.)

Appellant then attended Delta College, the only place he could find that was receptive to ex-felons. He saw an academic counselor, and signed up for machinery and welding classes. He worked closely with the lead welding instructor, Mr. O'Brien, who one day chose appellant to be one of the students sent out to the company of Pulver and Genau in Tracy. He was the only student in his class to pass a rigorous welding test, as well as a physical and a drug test. He was given a job by Dan Ronjue at Pulver and Genau and went to work. (35 RT 9130-9132.)

Appellant's federal parole agents came to his house, and once to his job. They called him aside and told he that he had to tell his boss exactly why he had been in prison or his parole would be revoked. He did so. His boss told him that he could keep his job because he had been doing fine work, and if he needed a day off or anything to comply with his parole, he could have it. (35 RT 9134.)

His work days began at 6:00 a.m. He regularly arrived at the job site at least a half-hour early. It was the first legitimate job appellant had held in his life. He testified that the fact that he could do this job and could do it well was a great feeling that made him proud. (35 RT 9135-9136.)

Appellant described for the jury the nature of and difficulties in his relationship with Antoinette Duque, and with his federal parole agent. (35 RT 9138-9145.) When he first came home from prison his brother David Zaragoza was living with their sister Nina, who was his conservator. After he returned home from having had his parole violated, David Zaragoza was living in a group home; Nina had found it impossible to live with both a husband who had been completely crippled by strokes (John could no longer speak) and could not care for himself, as well as with David Zaragoza, who used to harass John. (27 RT 6992.)

After he was released from prison, appellant spent most of his spare time with his family. He usually worked six days a week at his job. When he was not at work, he would go see his sister Valencia, who worked in a condominium complex. He would visit with her and work out in the weight room. He would also go see his brother Eddie and ride around on bikes with Eddie's two daughters. Eddie lived near Gaines Liquor Store. Appellant occasionally visited the Gaines Liquor Store and other nearby stores to buy his nieces candy and soda. (35 RT 9147-9148.)

Appellant knew David Zaragoza had been hanging around some drug houses, not far from where his mother lived. One day, he and Nina were going over to their mother's house when he saw David Zaragoza on

the street, barely recognizable. His facial features were "sucked in," as if he had lost 30 pounds in a week. Appellant told him he had to stop doing what he was doing. David Zaragoza said it was none of appellant's business, and asked him for money. (35 RT 9163.)

On Monday, June 7, 1999, he went over to Eddie's house. Eddie had called him and said, "David's here, we're eating tacos." Appellant went; he thought Eddie's wife, Stella, was a great cook. (35 RT 9149.) After dinner, he could see that Eddie was tired; Eddie worked a physical job at Westpack. Appellant volunteered to take David Zaragoza home. David promptly asked appellant for cigarettes. Appellant agreed to buy him a pack. The two of them stopped at Gaines Liquor Store, right around the corner from Eddie's house. Appellant entered the store to buy the cigarettes. When he got back to the car, David Zaragoza told him, "You got the wrong pack." David jumped out of the car, went in the store, and came back with a different brand. (35 RT 9149-9151.)

On Sunday, June 13, appellant's mother called him to say that detectives had talked to her concerning David Zaragoza, and they were on their way to see him as well. When they arrived, he invited the detectives in, introduced himself, and introduced them to Nina and John. (35 RT 9157-9158.) When the detectives asked him to come downtown to the

sheriff's department with them, appellant agreed. (35 RT 9168-9169.) There, he gave a recorded statement denying any involvement in the murder. (See People's Exh. 143a, 6 CT 1554-1624; Defendant's Exh. 338, 6 CT 1625-1721.)

The following Monday morning, he went to work, told his boss what was going on, and then went back to his mother's house. His sister was there when David Zaragoza called. He wanted Nina to pick him up at "Mental Health" and take him to a check-cashing place. When appellant and Nina Koker arrived at the clinic, David Zaragoza was waiting for his check. He asked appellant for a cigarette as soon as he saw him. Appellant invited him outside, gave him a cigarette, got out his lighter, and asked him what was going on. David's exact words were, "It's none of your business." Appellant then heard police tell him to get down on the ground. He was arrested at gunpoint. (35 RT 9161-9162.)

Appellant flatly denied ever having done any crimes with his brother, and denied any involvement in the death of David Gaines. (35 RT 9164.) He testified that on June 10, 1999, he had borrowed Nina's car to go to a high school graduation in Modesto with Toni (Antoinette Duke) and did not return until 10:30 p.m., past his normal bedtime. On June 11, he got up at his normal time of 3:00 a.m., and went to work. He came home a bit earlier

that day because his mom told him she had a doctor's appointment. (35 RT 9164.) He dropped the car off at his mom's, and she took him home. David Zaragoza called, and asked to talk to Nina. Nina didn't want to talk to him, so he asked if he could spend the night. Nina agreed only if appellant would be around. Appellant said that he wasn't going anywhere; he had to work the next morning and would be at home that evening. (35 RT 9171-9173.)

Appellant picked up David Zaragoza in his mother's car. As soon as they arrived at Nina's house, David Zaragoza went straight to the telephone to make calls. Appellant sat on a couch, near Nina's husband, John, who was on the other couch watching TV. David Zaragoza would always massage appellant's back or feet if asked, and on the night in question, appellant's feet were very tired. He asked David to rub his feet. He did, and appellant fell asleep. He woke up later, in the middle of the night, and David Zaragoza was gone. He then went back to sleep, waking at three a.m. to prepare for work. (35 RT 9177-9179.)

Ilene Yasemsky, a social worker, testified on appellant's behalf. She interviewed family members and presented appellant's family history to the jury. Appellant's mother became pregnant at age 14 by Louis Sr., the first boy with whom she became involved. Louis Sr. was violent, abusive and

mentally ill. He, like his son David, was obsessed with spaceships. At one point he dug a hole in the back yard like a grave; he thought if they died soon, aliens would come and pick them up. (34 RT 8841-8842.)

His obsessiveness and domination of everyone's life (see 34 RT 8846) finally drove Yolanda and the children out of their home. She moved to Stockton when appellant was seven years old and soon became involved with Albert Tahod; Mr. Tahod was not physically violent, but he was an alcoholic. He and Yolanda spent most of their time drinking together. (34 RT 8852.) Appellant in turn began acting out. He was arrested for shoplifting, malicious mischief, glue sniffing, and became a ward of the court by the age of 12. (34 RT 8847-8848.).

Appellant's mother remembers him coming home from the Youth Authority at age 15, finding her drunk, and saying, "And I came home to this?" (34 RT 8854.) Even so, appellant never blamed his mother or father for anything; he preferred to cut off his memory rather than blame his parents. (34 RT 8854.)

Ms. Yasemsky described appellant's involvement with Darrell Thomas, a man four years older and a good boxer who had been with appellant in the Youth Authority. Thomas was a strong-arm robber who got appellant involved in doing strong-armed robberies; the two of them

committed more than one of these robberies in September of 1975, culminating with the shooting of Benny Wooliver and the attempted robbery of a 7-Eleven store. (34 RT 8856.) Appellant was arrested and spent five years in the California Youth Authority.

Appellant's next brief time out of prison followed a similar course. While in custody, appellant met Reuben Arrellano, a CYA counselor who appellant believed respected him. Arrellano and his female friend set up the bank robberies committed by appellant and others, and in turn informed the FBI ahead of time about appellant's last bank robbery — a robbery that they had designed. (34 RT 8866-8867.)

Tami Brown, court reporter at Louis and David Zaragoza's arraignment on June 23, 1999, described David's on-the-record confession to the crime and exoneration of Louis. Shortly after Louis and David Zaragoza were brought into the courtroom, David Zaragoza indicated he wanted to talk to the judge. (34 RT 8963.) Even though the judge warned him that a reporter was taking everything down,[7] David Zaragoza repeatedly said that he was the one who shot and killed the victim, that his brother had nothing to do with it, that he wanted everything to be taken down, and that

[7] The exchange took place on June 23, 1999; it is reported at 1 RT 7a-15a.

he wanted to be sentenced that day. Getting no responses from the court, David Zaragoza asked if there was a doctor in the house. He eventually was removed for defecating in the courtroom. (34 RT 8964 et seq.)

### 3. Rebuttal

On rebuttal, the prosecution sought to show that David Zaragoza had made other, contradictory statements about the crime. Laura Gin Perez, David Zaragoza's investigator from the public defender's office, testified that she interviewed Stella and Eddie Tahod in August of 1999 about a call Stella got from David Zaragoza while he was in the county jail. Stella told her that David Zaragoza said that "we" shot that man. (36 RT 9402.) Ms. Perez had no recordings or notes of that conversation. (36 RT 9403.)

Stella Tahod testified that she reviewed that report a month or so before trial (she had been sent a copy of that report in 2000), and wrote under the word "we" that the words David actually used were "I shot that guy." (36 RT 9388-9389.)

Eddie Tahod was called to the stand, and asked about a statement David Zaragoza made to him that, on the night in question, he left the house and went walking, and an unknown white male picked him up; he committed the crime together with the white male. (36 RT 9394.)

According to DA investigator Mitchell Thiry, David Zaragoza told Yolanda Tahod that he was asking people for money at Yum Yum doughnuts, and a white man told him he would give him some change if David Zaragoza accompanied him; the man drove them over to North Stockton where the man shot someone. David Zaragoza also told his mother at another time that he had shot someone himself, but didn't mean to do it; he couldn't remember much about what happened. (36 RT 9416-9417.)

When Thiry first interviewed David Zaragoza, he denied having seen appellant on the night of the murder. (36 RT 9425-9426.) Appellant consistently maintained that he was home by 9:45 on the night of the murder. (36 RT 9429.) In both interviews with detectives, David Zaragoza simply denied that his papers were found at the crime scene. (36 RT 9438.)

**4. Surrebuttal**

The final witness called on appellant's behalf was San Joaquin County crisis clinician Keith Weyuker. He had ongoing contacts with David Zaragoza in the early months of 1999. (36 RT 9450.) In April of 1999, David Zaragoza reported to him that he was using street drugs, was not taking his medications, and felt he was a danger to himself or to others. (36 RT 9453.) Weyuker identified a document dated February 10, 1999, a

physician's admission of David done pursuant to section 5150. The document indicated that David was afraid that he would kill himself or kill someone else if they didn't help him. (Exh. LZ 102.) The box checked in the assessment form by Mr. Weyuker indicated that David Zaragoza was then a "danger to others." (Exh. LZ 103; 36 RT 9456-9457.)

## ARGUMENT

## I. THE EVIDENCE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

### A. Applicable Legal Standards; Review of the Evidence

When considering a challenge to the sufficiency of the evidence to support a conviction, this Court will review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Valdez* (2004) 32 Cal.4th 73, 104.) The relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.'" (*People v. Alvarez* (1996) 14 Cal.4th 155, 225, quoting *People v. Mickey* (1991) 54 Cal.3d 612, 678, fn. omitted.)

This Court does not, however, limit its review to the evidence favorable to the respondent.

> As *People v. Bassett*, *supra*, 69 Cal.2d 122, explained, "our task . . . is twofold. First, we must resolve the issue in the light of the *whole record* — i.e., the entire picture of the defendant put before the jury — and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of

> each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in light of other facts.'" (69 Cal.2d at page 138.) (Fn. omitted.)

(*People v. Johnson* (1980) 26 Cal.3d 557, 576-577, emphasis in original.)

Although the test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact, and not whether the evidence shows to the reviewing court that guilt was established beyond a reasonable doubt, the evidence must do more than merely raise a strong suspicion of the appellant's guilt. "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

This crime — the theft of a lunch bowl from a man who almost never brought money home with him, and murder of the man's son — was a senseless tragedy. In fact, the one perpetrator known to have been present, David Zaragoza, had been in and out of prisons and mental hospitals for decades, and was diagnosed as a schizophrenic in unstable remission at the time this crime was committed.

But David's brother Louis, appellant here, had a prior record of violence and bank robberies. As a 15-year-old, he was involved in the

shooting death of a cab driver and subsequent assault by firearm of a 7-Eleven employee. After release from the CYA he participated in a five-week series of bank robberies that led to 17 years in federal prison.

Appellant's prior record led the police to quickly abandon any efforts to establish that David Zaragoza had singlehandedly perpetrated the crime, even though David was the only person identified as being present at the crime scene. The sum total of evidence that appellant committed this crime was: (1) the victim's bowl was found in the trash outside his house, where David Zaragoza had also been; (2) the mental impairments of David Zaragoza, the only person known to be present at the crime scene; and (3) altered and contradicted testimony that there were two persons at the crime scene.

> There is a lack of ordinarily expected evidence of a murder.
>
> The absence of evidence, like Sherlock Holmes' curious incident of the dog in the nighttime which did not bark, may have as great an impact on the substantiality of a case as any which is produced, for the absence of evidence which would normally be forthcoming can undermine the solidity of the proof relied on to support a finding of guilt.

(*People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839.)

Here, there is no evidence showing that appellant was present at the crime scene. No eyewitnesses placed him there, no footprints were found, no broken twigs or anything from the area around the Gaines home

indicated that appellant or anyone else had hidden there. There was no evidence of criminal activity found on his person or his clothes or his car. There is no evidence of the murder weapon linked to him.

Another form of absent evidence is any indication that the police were interested in determining if David Zaragoza was the killer as well as the robber in front of the Gaines home. Even though they learned of David Zaragoza's presence there within hours of the crime's commission, and he was promptly contacted, the police did not examine him or his clothing for gunshot residue or other traces of a fight with David Gaines — and there was a strong likelihood that the perpetrator of the crime had blood, skin fragments, or gunshot residue on his clothing or himself in light of the numerous contact bullet wounds that killed David Gaines. The search of David Zaragoza's group home my fairly be described as desultory.

This studied indifference to evidence incriminating David Zaragoza is all the more striking given his prior record and his formal categorization by mental health services as a "danger to others" when the crime was committed. He had served terms in prison for robbery and for a separate assault charge. Less than two months prior to the crime, David Zaragoza had told counselors that he was consuming street drugs, not taking his prescribed medication, and was afraid that he would kill himself or kill

someone else; he was assessed as being a "danger to others" by the counselor.

In closing argument, the prosecutor wove a comprehensive theory of this case for the jury, a compelling narrative based on little or no evidence at all, or on physical evidence that was more congruent with David Zaragoza's guilt than appellant's. He accused appellant of (1) deciding that William Gaines took money from his liquor store to his house; (2) learning where William Gaines lived (his address was in the phone book); (3) determining that David Gaines would be present with William Gaines when they arrived back home; (4) deciding to have his brother David attack William Gaines and take his money, while he would hide out and kill David Gaines so he could not help his father; and (5) secreting himself between the Gaines house and the house of David French while waiting for William and David Gaines to arrive. (30 RT 7830 et seq.)

The prosecution argued that when William Gaines called out for his son to help him, appellant stepped out from a hiding place and attacked David Gaines while holding a pistol, moving from the northwest to the southeast. David Gaines pulled out a can of Mace. He turned away from the street and struggled with appellant, who fired lethal shots with a pistol close to or touching David Gaines as it discharged, and the two of them

struggled from the top of the driveway to its halfway point, where David Gaines fell. (30 RT 7842-7855.)

Meanwhile, the prosecutor asserted that David Zaragoza dropped the bowl that he snatched from William Gaines. As he bent over to pick it up, several of his papers came out of his shirt pocket and landed on the ground. David Zaragoza fled, and was quickly joined by his brother Louis. The two of them ran away from the scene of the crime to the east, towards Gettysburg Street. (30 RT 7856-7858.)

There are several problems with this narrative.

(1) There was no reason to believe that William Gaines would be bringing money home with him. He very rarely brought the store's proceeds home. There was a safe at the store for the day's receipts, and his bank was near the store. The prosecution argued that the crime occurred on Friday night because appellant believed that was when the week's money was taken home (30 RT 7835), but there is no evidentiary support whatsoever for this contention.

(2) There was no reasonable basis to believe that David Gaines would be present, let alone that he would have to be killed in order to successfully rob William Gaines. He only worked late with his father on Fridays and Saturdays, and sometimes missed those days

because of flight lessons. He normally went straight into the house from inside the garage. A thief familiar with David Gaines' habits could easily have avoided contact with him by simply seizing the bag from William Gaines and running away.

(3) It was extremely risky for men like appellant and David Zaragoza to try to hide out for an indefinite period near the crime scene (Mary Gaines testified that her husband would arrive home between 11:15 and 11:30 p.m.), either between the Gaines house and the neighboring house of David French, or across the street. Pictures of the area show that there was really no place to hide. The trial court found that the two of them hid behind foliage, or "in the dark." (12 CT 2672.) As Stanley Monckton observed, appellant "didn't belong in the neighborhood." (25 RT 6485-6486.)

(4) If appellant had jumped out from behind foliage and surprised David Gaines, spun him around, and shot him four times, three times with fatal rounds at very close range, it is not easy to see how David Gaines would have been able to find and use his can of Mace, nor is it easy to see how they traveled halfway down the driveway.

The physical evidence at the crime scene is more congruent with David Zaragoza being the perpetrator rather than appellant. Of the three bullets that pierced David Gaines, one went through his body, landing to the east, on David French's lawn. The position of the bullet suggests that the shooter was standing west of David Gaines, where William Gaines's car was parked, and where David Zaragoza would have been when he moved toward David Gaines.

The presence of blood on the self defense canister, combined with the grazing wound which David Gaines suffered to his wrist shows that he was moving to attack his father's assailant, which strongly suggests that David Gaines saw his assailant and responded before he was shot.

David Gaines's body was found exactly halfway down — or up — his 48-foot driveway. The prosecutor emphasized that William Gaines did not see his son shot, nor did he see the muzzle flash from the shot. (30 RT 7859.) If William Gaines was knocked completely over and could see nothing at all, this would make sense. If William Gaines is to be taken as an eyewitness after the point when he is struck, however, then the driveway does not afford enough space for appellant, or the gunshot wherever it may have come from, to be imperceptible, unless the shots were all fired away from William Gaines.

The fact that David Gaines sustained two fatal chest wounds at point blank range, and a fatal head wound from very close range, means that David Gaines's body was not likely to fall far from where he was shot, especially since some of his wounds are at an angle which indicates that he was falling when shot. The prosecutor's convoluted effort to describe a struggle between appellant and David Gaines spinning down from the top of the driveway down to the middle of the driveway is nothing but literary speculation.

As this Court noted in *People v. Thomas* (1992) 2 Cal.4th 489, 516, the *Blakeslee* court properly found insufficient evidence where much of the evidence was just as consistent with the guilt of defendant's brother as with the defendant herself, and therefore could not support a verdict of her guilt. Here, the physical evidence is more consistent with David Zaragoza being the sole perpetrator than with appellant being involved at all.

The thin external evidence pointing to appellant's involvement in David Gaines' death includes the presence of the victim's salad bowl at the house appellant shared with his sister's family, the lack of evidence that David Zaragoza had any experience driving in the 1990s, and David Zaragoza's extensive mental impairments; a jury found him incompetent to stand trial for this offense. A Jack in the Box receipt was also found in the

garbage at that house, in appellant's garbage, for a hamburger and water totaling 99 cents purchased at a Jack in the Box half a mile from the Gaines residence at 12:03 a.m., 47 minutes after the crime was committed.

Appellant's sister Nina testified that she went to that Jack in the Box the night of the murder around midnight. The prosecution impeached her with evidence that she was locked out of her car several miles away at 12:03 a.m. Complicating matters, however, was that the receipt was for hamburger and water, but Nina testified that she always ordered french fries, and there were indeed french fries in the garbage Jack in the Box bag, along with ketchup and a box of Marlboro Lights, the cigarette brand Nina was smoking at the time. The defense therefore argued that Nina was telling the truth and the receipt was simply not correct, an "error by a minimum wage clerk."[8] (30 RT 7924; 10 CT 2660.)

The defense theory of the case was that David Zaragoza alone committed the crime. He struck William Gaines and grabbed the sack that William was carrying. William Gaines called out "David!" the first name

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[8] In his motion for a new trial, counsel wrote, "[t]he argument advanced by the people at trial that defendant had a desire to go back to the scene 45 minutes after the crime and then went over for a burger and water once he had looked around (even though no one saw a suspicious car when there were sheriff's deputies swarming all over the area) strains credibility." (10 CT 2660.)

of both David Gaines and David Zaragoza; David Gaines yelled, "Hey," and came down the driveway toward his father and the assailant, pulling a can of Mace from his pocket. As David Zaragoza saw him coming with a can of Mace in his hand, he pulled out a gun, spilling his papers in the process, ran up the driveway, met David Gaines halfway between the garage and the street, and shot him. (See reconstruction of the crime as presented to the jury via videotape at 28 RT 7211; 9 CT 2510 et seq.)

David Zaragoza returned alone to his group home between 10:00 p.m. and 11:00 p.m. This timing comports with him leaving appellant asleep, and going home to pick up a gun. He was later seen returning to the group home alone before midnight, a scenario that comports with his returning to appellant's house after the crime, leaving the keys and the empty bowl, and walking the two-plus miles to his house.

How many people did eyewitnesses see? One of them, Carol Maurer, an elderly female who lived straight across the street from the Gaines, told the police on the night of the crime that she was awakened by gunshots, looked out her window, and saw two young white males running almost side by side toward the east. She recalled the clothes of one of them, who was dressed in white. On the other hand, Cindy Grafius, who lived four houses to the east of the Gaines, looked out her window, and got a

good look (three seconds) at one man running alone to the east. Ms. Maurer's testimony that she saw two people running side by side is undermined by William's testimony that he saw his assailant running alone from 20 to 30 feet away when he heard gunshots, and ducked, and saw two people about 50 to 100 feet way, one running about ten feet behind the other. Moreover, Ms. Maurer's view to the east was cut off by her garage.

William Gaines testified at trial that there had to have been at least two people involved. The trial court found that William Gaines was not credible on this point, because he had had numerous opportunities before trial to report two people, and had never done so. (10 CT 2672.) However, the trial court did find credible William Gaines's testimony that he was watching David Zaragoza flee when he heard gunshots, even though this was not the sequence of events reported by William Gaines during interviews conducted shortly after the crime.

Initially, William Gaines told the police that he was hit in the jaw and then the shoulder as he got out of his station wagon, and fell to the ground. The bag in his hands was ripped away by his assailant. He yelled for his son. His son yelled at the assailant. He heard gunshots, and saw the person who had hit him running away to the east. (See *ante*, p. 12.)

At trial, however, after preparation by the prosecutor, William Gaines testified that he down on one knee, and never fell down. The bag fell to the ground when the assailant grabbed it. His assailant bent over to pick it up with both hands. William Gaines kept his eyes on the assailant as he ran down Cameron Way; while watching the man run, he heard gunshots. (See *ante*, p. 9.)

This testimony was significantly different from his earliest statements to the police. The trial court found some of William Gaines's changed version of events to be credible while finding incredible the change from one assailant to two. The trial court made no effort to explain this differential treatment of William Gaines's changed version of events.

The prosecution accounted for the 13 pieces of David Zaragoza's papers found on the ground by William Gaines by having David Zaragoza bend over to pick up the bowl that fell to the ground when he tried to snatch it from William Gaines. (30 RT 7835-7836.) The defense asserted that simply bending over was not likely to cause such spillage, and that it was David Zaragoza pulling a gun from his pocket that brought all his papers along with it. In the videotape of David Zaragoza's interview, the police

had him bend over with tobacco and a lighter in his shirt pocket to pick up an item they placed on the floor. Nothing fell out.[9]

William Gaines found these papers after calling the police and checking on his son. He thought they were his because he believed that he had lost papers in the scuffle. He scooped them up without reading what he had gathered, and called the police the next morning when he realized that most of them had nothing to do with him. The defense argued that had William Gaines simply dropped to one knee, as he testified at trial, he would not have actually lost papers from his shirt pocket, nor would he have believed that he had done so — it was more likely that he was truly knocked to the ground by David Zaragoza, who was a trained boxer.[10] (28 RT 7171-7172.)

Evidence of motive is not required to secure a conviction, but the presence or absence of a motive is relevant evidence. (*People v. Clark* (1992) 3 Cal.4th 41, 127.) Appellant had absolutely no motive to commit this crime. The prosecutor first contended that this crime was committed for the money that would supposedly be found in the bag grabbed away

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[9] The trial court refused to allow appellant to show the jury that portion of the videotape. (See Claim III, *post.*)

[10] David Zaragoza had been in prison between 1992 and 1998 for punching a roommate at a group home for no apparent motive; he had struck him hard enough to knock him unconscious. (25 RT 6420-6421.)

from William Gaines. The prosecutor argued that appellant had a miserable life, and was "living from paycheck to paycheck." (30 RT 7967.)

The prosecutor later stipulated that two of appellant's checks had not been cashed. (35 RT 9461; Exhs. 342 and 343.) Apparently realizing that this financial motive was suspect, the prosecutor accused appellant in his penalty phase argument of doing this crime for the "adrenaline rush." (35 RT 9231.)

Appellant had a decent wage and very low expenses. He was living with his family, who loved him and whom he loved. For the first time in his life, he had gotten a legal driver's license. He had learned a demanding trade, and obtained a well-paying position at a fabricating plant. His supervisor was happy with his work.

David Zaragoza, on the other hand, had indisputably stopped taking his prescribed medication and had been using street drugs for months, though he lived primarily on vouchers. He was spiraling downward, and had asked for help, telling mental health workers that he was a danger to himself and a danger to others, that he was afraid he might kill someone. There is insufficient evidence in this record to allow anyone to believe beyond a reasonable doubt that it was appellant, and not his brother, that killed David Gaines.

In a written ruling, the trial court rejected appellant's motion for a new trial, and laid out its understanding of the evidence:

> The evidence showed that the defendant, because his half-brother lived in the neighborhood, shopped at a liquor store and became familiar with the habits of an 80-year-old owner of the liquor store in leaving his store in the late evening, commonly in the company of his son, the deceased, and returning to their home across town.

(10 CT 2671.)

The trial court's narrative here is fabricated from an assumption that appellant was guilty, and not from any evidence presented at trial. According to Stella Tahod, appellant's sister-in-law, appellant would come by their house and take her daughters out to bicycle around and buy them treats at neighboring stores, including Gaines Liquor Store. (24 RT 6367-6368; 26 RT 6826.) Appellant had also stopped at Gaines Liquor store to buy his brother cigarettes as they left the Tahod house after dinner on June 7, 1999. There is no other evidence of any kind linking appellant to Gaines Liquor Store or members of the Gaines family — except Billy Gaines's false testimony that appellant came into the store before 3:00 p.m. on June 10, 1999, asking about video cameras. (See *ante*, p. 19.)

Next, the trial court states, "it was the habit of William Gaines, the owner, to take eating utensils home in bags, and although he rarely took money, it is a fair inference that the defendant believed the bags contained

money." (10 CT 2671.) There is nothing either fair or reasonable about making such an assumption. Nothing in this record points to appellant and not his brother as holding such a belief.

The trial court then narrates a sequence of events based not on trial evidence, but rather on the assumption that appellant was guilty ["armed with a gun, the defendant and his seriously mentally disturbed brother went to the residence at a time it was the habit of William Gaines to arrive. The defendant hid himself from view, probably behind landscaping but at least in the dark, in the front area of the home. His brother, David, was not seen on the street by William Gaines, and was probably waiting across the street in the dark."]. (10 CT 2671.) All of this flows from an assumption that appellant was guilty. None of it is supported by any evidence.

The trial court's narration then selectively follows the trial testimony of William Gaines, without explaining why certain parts of his testimony were accepted and others rejected. (10 CT 2671-2672.) The court did not believe that William actually saw two people because he had never mentioned seeing two people before, despite having had several opportunities to do so, and noted several other parts of William's version that changed over time, but was convinced that William Gaines was truthful

when he testified that he saw David Zaragoza run down the street when he heard the gunshots. (10 CT 2672.)

This was not what William said when initially interviewed. (24 RT 6327-6329; see *ante*, p. 12.) Nothing in any of his initial statements to the police stated or suggested that more than one person was involved.

The trial court then compared the neighboring eyewitnesses:

> The Gaines' neighbor, witness Carol Maurer, gave several versions of whether she was awakened by shots or something else and about whether she saw "kids" or "grown up men" run. She also had differing estimates of how far apart the two were. Though the court considered these different versions, the court was convinced she saw two persons running down the street shortly after the shots were fired.
>
> The fact that other neighbors, witnesses David French and Cindy Grafius, did not see two persons running is in this court's mind adequately accounted for by the fact that it cannot be determined exactly when they looked out compared to Ms. Maurer, and the fact that their vantage points blocked them from a view of the entire street.

(10 CT 2672.)

The record shows that it is Ms. Maurer's house that featured a garage protruding toward the street. Ms. Maurer testified that she saw the young men running until her view was blocked by her garage. Her garage was on the east side of her house, and would have necessarily blocked her view of anyone running towards the east. Aside from issues of Ms. Maurer's vision, and when she went to the window, there is nothing about her

vantage point that would give her a view of the entire street. She described the clothes of one young man, who she said was dressed in white,[11] but could not remember anything about the clothes of the other man. Her testimony that the two young men were running close to each other is at variance with William Gaines's testimony about his assailant running away by himself for some distance (10 to 50 feet) before he heard the shots that killed his son.

Ms. Grafius, meanwhile, was located on the same side of the street as the Gaines family, four doors down. She described getting a clear look at one man fleeing. Her initial estimate of ten seconds was shaved down to three seconds. Both sides introduced photographs of the two houses, and the view from each one. There is nothing in the record to suggest that Ms. Maurer had a better vantage point that did Ms. Grafius, or that she could see the entire street.

The court then turned to what it believed to be the most compelling evidence: the presence of the Gaines salad bowl in appellant's house. The court did not find it reasonable to believe that David Zaragoza could take the keys to his mother's car after appellant was asleep, commit the crime,

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[11] In his June 13, 1999, interview, appellant was asked how David Zaragoza was dressed the evening of June 11, 1999. He told the detectives that David was very dressed up that night in white. (7 CT 1998.)

return to the house, leave the bowl and the keys behind, and then return to his group home. (10 CT 2673.) Yes, this is improbable — but it is the prosecutor's narrative that is not supported by the evidence.

Contrary to what the trial court asserted, the defense theory was quite possible. There is no dispute that appellant picked up his brother from the group home in the evening, sometime just after 9:00 p.m., and took him home. There is also no dispute that David Zaragoza returned by himself to the group home between 10:00 p.m. and 11:00 p.m. He could easily have driven there to pick up a weapon.

The crime occurred at about 11:15 p.m.; David Gaines's watch stopped at 11:16 p.m. David Zaragoza could have run to his car parked on Gettysburg around the corner, driven the six miles home, parked the car and dropped off the bowl and the keys, and walked the two-plus miles back to his group home before midnight. This is at least as likely as the prosecution's theory that would place appellant in the center of planning this crime and then relying on his severely impaired brother to be the actual thief, while appellant shot and killed someone who was not really a threat to stop the crime from being committed, in order to steal something that was highly unlikely to contain anything of real value.

The trial court then said that the facts of this crime "show a high degree of *criminal sophistication* on the part of the defendant." (10 CT 2673; emphasis added.) This was not a sophisticated crime in any sense of the word. David Zaragoza could have easily learned where the owner of the liquor store lived, and found his house. The "Gaines Liquor Store" was owned by the Gaines family, whose address was found in the telephone book available in the downtown library in Stockton. (28 RT 7304.)

In sum, the defense theory of how the crime was committed is more consistent with the facts available from the crime scene itself than the case against appellant, and quite capable of raising a reasonable doubt in the mind of a rational juror. The prosecutor's case hinged on David Zaragoza's impairments — it is plausible only if he was so incompetent that he could not look up an address in the phone book, read a map, or drive a car. David's mental illness, however, did not keep him from living in a group home, getting around Stockton, or going to the library.[12] David's impairments render it highly unlikely that anyone would ever choose him as a crime partner with a leading role, in a crime that could easily have been done by one person. As a user of illicit drugs who had no means of

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[12] The materials that fell from David's pocket at the crime scene, in addition to court papers, included a Readers Digest article on developments in Israel. (See Exh. 88.)

employment, David Zaragoza had a greater need for money than did appellant.

**B. Conclusion**

Recent history has provided exonerations of persons sentenced to death in sufficient number for patterns to emerge. Since 1973, 138 people in 26 states have been released from death row with evidence of their innocence. (*Facts about the Death Penalty* (2010) Death Penalty Information Center <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [as of Nov. 15, 2010].) Research has identified modest predictors for why capital cases might end in exoneration over execution.

Defendants who have been exonerated were (1) significantly less likely to be reported as mentally ill; (2) more likely to have been tried for crimes that involved two or fewer victims; (3) less likely to have confessed; (4) more likely to have claimed innocence at trial; and (5) more likely to have had an extensive criminal record (especially violent felonies) than those who were executed. "Wrongful convictions were more likely in sensational cases, in cases investigated more hurriedly, and when police officers already presumed the suspect to have criminal proclivities." (Gould, J., and Leo, R., *One Hundred Years of Getting It Wrong? Wrongful Convictions after a Century of Research* (2010) for publication in J.Crim.L.

& Criminology p. 53; Gross, S., and O'Brien, B., *Frequency and Predictors of False Convictions: Why We Know So Little, and New Data on Capital Cases* (2008) 5 J. Empirical Legal Studies 927, 952-957.) This is precisely the case at bench.

In *Jackson v. Virginia* (1979) 441 U.S. 307, the high court laid down the principles that guide appellate consideration of claims that the evidence does not support a conviction: "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Id.* at p. 319; emphasis in original.) While evidence must be considered by the reviewing court in the light most favorable to the prosecution, that consideration must be based on a review of "*all of the evidence*." (*Ibid.*; emphasis in original.)

As mandated by *Jackson* and this Court's jurisprudence, the question on appeal is whether a *rational* trier of fact could have found the essential elements of the crime beyond a reasonable doubt. What are the standards by which a rational juror is guided? The key principle is that the evidence must be substantial, and must be "reasonable, credible, of solid value." (*People v. Valdez*, *supra*; *People v. Johnson*, *supra*, 26 Cal.3d at 578; see

also *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 589, cert. den., 508 U.S. 989.)

The evidence supporting these verdicts is too thin and speculative to meet this requirement.

## II. THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT TO CALL AS A WITNESS HIS CODEFENDANT AND THE SELF-CONFESSED SOLE PERPETRATOR OF THE CRIME PREJUDICIALLY VIOLATED HIS RIGHT TO DEFEND HIMSELF.

### A. Procedural Background

During arraignment on June 23, 1999, David Zaragoza stood up and declared that he had shot David Gaines; he had done it alone and his brother Louis had nothing to do with it. When no one paid attention to him, he defecated, and was removed from the courtroom. (1 RT 7a-15a; 34 RT 8964 et seq.) He made other statements exonerating appellant and admitting the crime, to his family members and to a cellmate in the county jail. (5 CT 1229-1242.)

David Zaragoza was ultimately found incompetent to stand trial, and was sent to Atascadero State Hospital. On January 25, 2001, appellant subpoenaed him to testify. (5 CT 1260-1261.) Counsel for David Zaragoza filed a motion to quash the subpoena on January 31, 2001. (5 CT 1278-1289.) On February 1, 2001, the trial court quashed the subpoena, on grounds that the witness had been found by a jury to not have the ability to assist his counsel in defending against this capital crime, and was therefore incompetent to stand trial. His counsel did not want him to have the opportunity to testify in this case. (26 RT 6893-6894; 5 CT 1290.)

The trial court ruled as follows:

> We know that the 1368 law has some seemingly contradictory case law at various aspects where a particular defendant is permitted to do things and where a defendant is not permitted to do things and his attorney is permitted to do them in the defendant's place. So it wasn't as if it was a clear-cut issue. On the other hand, I think we are left with general principles. And we have to reason backward and reason backward from the concept that a defendant who has been found incompetent to stand trial has been found by what amounts to a general verdict to not comprehend his own status and his situation in reference to the proceedings and able to assist his attorney in conducting his own defense to be unable to understand the nature of the charges against him.
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> I don't think that in David Zaragoza's case that the latter one is the significant issue. I think he understands what he's charged with, in some general way anyway. But he doesn't understand his own status, the relationship to the proceedings. He's not able to assist his attorney in his own defense. And if he were not incompetent and he were to stand up and wish to testify, Mr. Quinn's objections would have to be disregarded. If he chose not to testify, he chose not to take the stand, of course, I'd have to respect that. I wouldn't be able to question it. When he's incompetent to stand trial, he's incompetent to make the decisions whether that's a rational thing to do. And it is his defense. It is his defense because he's still charged with a crime. He still is required to decide whether this is a wise move to make, whether his calculations are correct, that if he testifies, he bears a risk of being convicted of the charge. He's not able to make those kinds of decisions at this point according to the jury and according to the presumption that I have to go on at this point. So the Court's going to find that — the Court's going to quash the subpoena and rescind the transportation order.

(26 RT 6893-6894.)

In so ruling the trial court erred, and effectively eviscerated appellant's defense. David Zaragoza's attorney had no right to frustrate David Zaragoza's desire to testify on appellant's behalf. The court's ruling was a prejudicial denial of appellant's state and federal constitutional right to compulsory process, as well as due process and equal protection of the laws, and requires that his convictions and sentence be set aside.

This Court recently observed that:

> [F]or those accused by the government of having committed a crime, the Sixth Amendment to the United States Constitution sets forth several fundamental protections, including the right to legal counsel, to an impartial jury, to notice of the charges, to confront one's accusers, and to a speedy trial. Pertinent to the matter before us today is another component of the bundle of rights guaranteed by the Sixth Amendment: the right of one accused of a crime to compel the testimony of those who have favorable evidence. Thus, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

(*People v. Jacinto* (2010) 49 Cal.4th 263, 268.)

Article I, section 15 of the California Constitution also guarantees as a matter of state constitutional law that "[t]he defendant in a criminal cause has the right . . . to compel attendance of witnesses in the defendant's behalf. . . ." This provision guarantees to defendants the right to compel the attendance of witnesses as a basic component of a fair trial. (*In re Martin* (1987) 44 Cal.3d 1, 30; see also *People v. Barnum* (2003) 29 Cal.4th 1210,

1223 ["The right to compulsory process is a 'fundamental' right."].) "A judicial system with power to compel attendance of witnesses is essential to effective protection of the inalienable rights guaranteed by [the state Constitution]." (*Vannier v. Superior Court* (1982) 32 Cal.3d 163, 171; *People v. Jacinto*, *supra*.)

The trial court thought that this issue was unprecedented, but it overlooked how closely the facts of *Washington v. Texas* (1967) 388 U.S. 14 track this case. In *Washington*, the defendant tried without success to subpoena a codefendant who had taken responsibility for the shooting of the victim. The U.S. Supreme Court first found that the right to compulsory process guaranteed by the Sixth Amendment applied to the states via the Fourteenth Amendment.[13] The court explained:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of

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[13] Justice Harlan, who never accepted the freighting of separate components of the Bill of Rights into state criminal procedure by the Due Process Clause, nonetheless agreed that a defendant should have the right to subpoena his codefendant as a witness. He did so on grounds that "the Due Process Clause is not reducible to a series of isolated points, but is rather a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." (*Washington v. Texas*, *supra*, 388 U.S. at p. 24.)

> challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

(*Washington v. Texas*, *supra*, 388 U.S. at p. 19.)

The high court struck down a Texas rule disqualifying an alleged accomplice from testifying on behalf of the defendant. (*Washington v. Texas*, *supra*, 388 U.S. at p. 23.) In a footnote, the court explicitly stated that it was not seeking to undercut or affect long-recognized exceptions:

> Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualifications for interest. Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, *are incapable of observing events or testifying about them.*

(*Washington v. Texas*, *supra*, 388 U.S. at 23, fn. 21; emphasis added.)

David Zaragoza fit into none of these categories. Except as provided by statute, "every person, irrespective of age, is qualified to be a witness." (Evid. Code, § 700; see also § 1321.) The primary statutory grounds for disqualification are an inability to express oneself comprehensibly on the subject of the testimony and inability to understand the obligation to tell the truth. (Evid. Code, § 701.) In *People v. Anderson* (2001) 25 Cal.4th 543, 574, this Court found that even a witness who suffered from delusions was

not incompetent to testify, and that it was up to the jury to determine if the witness's recollections were true. The jury should have had the same opportunity in this case.

There was no finding by the trial court that David Zaragoza suffered from testimonial incompetence. Mr. Quinn did not distinguish between testimonial incompetence and the very different question of whether his client was competent to stand trial. He made no argument that David could not be a witness.[14]

Instead, he argued that it was not in his client's interests to appear, and that he had the authority to refuse David Zaragoza the opportunity to testify on appellant's behalf. The authorities he cited for this contention were this Court's decision in *People v. Masterson* (1994) 8 Cal.4th 965, and Evidence Code section 930. (See 26 RT 6859-6870; 5 CT 1281-1286.) Neither was relevant, much less controlling.

At issue in *Masterson* was the extent to which counsel can control the course of a competency hearing. This Court held counsel may waive a jury trial in competency proceeding, which is a procedure created by statute

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[14] In fact, as the prosecutor noted, the experts presented on David's behalf during his competency hearing all testified that he could, and did, make a voluntary waiver of his Fifth Amendment privilege against self-incrimination. (26 RT 6874.)

and not a constitutional right, and make other decisions regarding a jury trial, even over defendant's objection. (*Masterson*, 8 Cal.4th at p. 971.)

In *Masterson*, this Court noted other cases where it had addressed related issues, including *People v. Frierson* (1985) 39 Cal.3d 803, 817-818 & fn. 8 [counsel may not override defendant's wish, expressed on the record, to present a mental defense], and *In re Horton* (1991) 54 Cal.3d 82, 95 [contrasting those situations in criminal cases in which the defendant must personally waive a right on the record and those in which the attorney alone may act unless there is an "express conflict . . . between the defendant and counsel," in which case "the defendant's desires must prevail." One of the rights which counsel cannot override is "whether to waive the right to be free from self-incrimination." (*Masterson*, 8 Cal.4th at p. 972.)

In *People v. Allen* (2008) 44 Cal.4th 843, this Court found that defendant had a due process right to testify notwithstanding his attorney's wishes when being subjected to a civil proceeding to determine if he would be a danger to society if released: "Although normally the decision whether a defendant should testify is within the competence of the trial attorney [citation], where, as here, a defendant insists that he wants to testify, he cannot be deprived of that opportunity.' [Citation.]" (*Allen*, 44 Cal.4th at p. 860.)

Courts of appeal have divided on the question of whether an attorney can prevent his or her client from testifying at the client's *own* competency hearing. In *People v. Harris* (1993) 14 Cal.App.4th 984, and *People v. Bolden* (1979) 99 Cal.App.3d 375, the courts held that defendants could proceed to testify notwithstanding the objections of their attorneys, while *People v. Bell* (2010) 181 Cal.4th 1071 held that counsel's wishes prevailed, over the dissent of Justice King. No court of which appellant is aware has ruled that a person found incompetent to stand trial for criminal charges must follow the direction of the attorney appointed to represent him on those charges when asked to testify in other proceedings.

Here, David Zaragoza was subpoenaed long after his competency hearing was resolved favorably to him. Although counsel argued that the privilege against self-incrimination applied because the two brothers had the same case number and the proceedings were identical (26 RT 6866),[15] when appellant was tried, David Zaragoza was not involved in that or any other proceeding. There were no cases cited by David's counsel, or of

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[15] In appellant's record correction hearing, David Zaragoza's counsel successfully intervened to prevent appellant from getting access to psychiatric materials used in David Zaragoza's competency hearing in part by arguing the opposite position: that those proceedings had nothing to do with appellant's trial and were entirely separate, and even had a separate case number. (See 28 CT 8067.)

which appellant is aware, that allow an attorney to prevent his or her client from appearing as a witness in any proceeding where the potential witness wants to testify.

Appellant understands and appreciates David Zaragoza's privilege against self-incrimination, and knows he can not compel David Zaragoza to testify over David's own objections. David Zaragoza's attorney relied on Evidence Code sections 930 and 940, and the privilege against self-incrimination; but appellant does not question David Zaragoza's right not to testify. What he questions is the right of *counsel* to keep him from making that choice.

Counsel relied on a general assertion of authority as David's counsel to oversee his interests, but did not cite any case that allowed counsel to exert the powers he wished to exert. Counsel represented David Zaragoza at his competency trial, but was not appointed his conservator or guardian. Counsel does not get to direct David Zaragoza's treatment, does not get to determine which of David's family members may visit him, and does not get to overrule David Zaragoza's desire to testify on his brother's behalf.

Many people testify against their penal interests, because they have other family-related or moral or spiritual interests that feel more compelling to them. David Zaragoza's counsel should not have been allowed to

obstruct a capital defendant's right to present a defense by sequestering or isolating a willing exonerating witness such that he may not be examined and cross-examined. The trial court erred in quashing appellant's subpoena of his brother, the only certain participant in the crime that led to the death of David Gaines.

### B. The Error of Refusing to Allow David Zaragoza the Opportunity to Testify Was Prejudicial.

The prejudicial effect of a violation of appellant's Sixth Amendment right to present a defense is measured by the standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18, 24: whether, assuming the damaging potential of the error were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684).

The prejudicial effect of not allowing a witness who was undeniably at the scene of the crime, and active in committing it, to say that he alone committed the crime, is obvious. In *Arizona v. Fulminate* (1991) 499 U.S. 279, 296, the high court wrote,

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may

justifiably doubt its ability to put them out of mind even if told to do so." [citations omitted].

It is quite likely that David Zaragoza could have testified in a way that made the jury consider that he indeed had done the crime himself, even while reinforcing the view that he is mentally impaired. The trial court's refusal to allow appellant to call him as a witness kept appellant from truly being able to defend himself, and was prejudicial error.

### C. Exclusion of the Evidence Precluded the Reliability Required by the Eighth and Fourteenth Amendments for a Capital Conviction and Sentence of Death.

As noted above in Argument I, the Eighth and Fourteenth Amendments require a heightened reliability for any conviction of a capital offense. (*Gilmore v. Taylor* (1993) 507 U.S. 333, 342; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Alexander* (2010) 49 Cal.4th 846, 914.) No such reliability can be accorded to a finding of guilt in this case.

It was not an easy decision for the jury, who deliberated over 20 hours. (See Statement of the Case, *ante.*) Appellant was not allowed to present testimony from the only person placed at the scene of the crime by physical evidence, who would have told the jury that appellant was innocent, and that he had committed the crime himself. The verdict reached in this case without David Zaragoza's live testimony was not a reliable verdict. The error in refusing to allow him the opportunity to appear on

appellant's behalf was not harmless. Appellant's guilt verdicts and sentence should be set aside.

## III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ALLOW A KEY PORTION OF DAVID ZARAGOZA'S VIDEOTAPED INTERVIEW TO BE PLAYED FOR THE JURY.

### A. The Trial Court's Error

In closing argument, the prosecution tried to explain the appearance of David Zaragoza's papers on the ground at the Gaines residence by asserting that they fell out of his shirt pocket during the robbery:

> And so the bag — after the bag is ripped, the bag — the bowl falls down to the ground. And David Zaragoza goes to pick up the bowl. And as he goes up to pick up the bowl, he drops this book and release form. The book and release form that has "Mr. Zar" on it. And not only does the book and release form come out, all the other papers come out, too.

(30 RT 7835-7836.)

Appellant, on the other hand, argued that simply bending over would not have caused such a cascade of papers[16] to the ground — that the papers must have come out when David Zaragoza heard David Gaines yell, and pulled a gun from his pocket. (30 RT 7961-7962; see animated reconstruction of the crime shown to the jury at 28 RT 7177 et seq., Defendant's Exh. 300A.)

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[16] There were 13 separate documents, most of them small. (See Exh. 88.)

David Zaragoza's interview by Detectives Wuest and Alejandre on June 13, 1999, was surreptitiously recorded. (See Exh. LZ 62, 8 CT 2189 et seq.) At one point in the interview, at pages 55-56 of the transcript (8 CT 2243-2244), Detective Wuest reaches over and puts Bugler tobacco and a cigarette lighter in David Zaragoza's shirt pocket, and then puts something on the ground. Wuest then asks David Zaragoza to stand up, walk over, and pick up the item placed on the ground. He does so, bending forward — and nothing falls out of his pocket. (See also 28 RT 7353-7354.)

Appellant requested that the jury be shown this portion of David Zaragoza's interview, to support the animated video reconstruction of the crime. His witness, reconstruction engineer Jorge Mendoza, had been challenged by the prosecutor as not having a factual basis for his depiction of how the papers fell out of David Zaragoza's pocket. (28 RT 7235 et seq.) The prosecutor protested, saying that the excerpt was in the nature of an experiment, and could not meet *Kelly*[17]/*Frye*[18] standards for admitting expert testimony. After further argument, the prosecutor withdrew his objections. (28 RT 7353-7355.)

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[17] *People v. Kelly* (1976) 17 Cal.3d 24.

[18] *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

However, he renewed them just as trial counsel was on the brink of playing the taped David Zaragoza interview, saying, "it's an improper experiment that's got no relevance, no value. It's non-testimonial. Its prejudice outweighs its probative value. Implies that Detective Wuest conducted a known valid experiment." The trial court agreed, and precluded appellant from showing that portion of the tape. (28 RT 7423-7424.)

This tape excerpt did not purport to be a scientific test. It depicted case investigators in action, and was part of the development of the case against appellant — a part the prosecution did not want the jury to see. The evidence supported appellant's version of events at the crime scene. It also supported appellant's contention that the investigators decided prematurely that appellant was the perpetrator, and thereafter ignored evidence to the contrary. Exclusion of this evidence was prejudicial error.

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S., at 485; *cf. Strickland v. Washington*, 466 U.S. 668, 684-685 (1984) ("The Constitution guarantees a fair

trial largely through the several provisions of the Sixth Amendment.") (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts. (*People v. Garceau* (1993) 6 Ca1.4th 140, 177.)

The evidence at issue was not proffered as anything like a scientific experiment that would be subject to the rigors of establishing the scientific validity and reliability laid out in *People v. Kelly*, *supra*, or *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579. The *Kelly* rule providing that the admissibility of expert testimony based on a new scientific technique requires proof of its reliability "applies only to that limited class of expert testimony which is based, in whole or in part, on a technique, process, or theory which is new to science and, even more so, to the law." (*People v. Cowan* (2010) 50 Cal.4th 401, 470; *People v. Leahy* (1994) 8 Cal.4th 587, 598-604.)

The evidence was generated by the prosecution — specifically, by the case's investigating officers — and it support appellant's version of

events. The officers who placed objects on the floor and asked David Zaragoza to bend over were not, and did not consider themselves to be, "scientific experts." They were not employing a technique that was "new to science, and, even more so, to the law." None of the dangers inherent in complex scientific testimony that might intimidate or overawe a jury with "infallible" evidence are present here. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1159.)

It also supported appellant's key contentions in his closing argument about the overly hasty way in which the authorities determined that appellant was the killer of David Gaines. Trial counsel began his closing argument on appellant's behalf by showing how the case investigators and prosecution decided very early that appellant shot David Gaines, and either ignored or failed to develop evidence that might not support their hypothesis. (30 RT 7899-7901.) Here, we have a vivid example of the police having David perform the same act they ultimately accused him of doing at the crime scene — and finding that it did *not* produce the effect they ultimately told the jury it would have.

The evidence was not at all time-consuming. The video excerpt was only a matter of a few moments. There is no lawful basis for it to have been kept from the jury.

The trial court noted that there was no evidence that it was the same shirt — but the prosecution argued strenuously that David was wearing the same pants, "scrubs" without pockets, when the crime was committed as when he was interviewed by case investigators. (30 RT 7839.) On the other hand, the only clothing of a perpetrator identified by a witness at the scene (Carol Maurer) was colored white — the same color described by appellant as David's preferred clothing when he was questioned by case investigators. The lack of certainty as to David's clothes would affect the weight of the evidence, but not its relevance.

**B. Prejudice**

This evidence would have refuted the prosecutor's version of events. It would also have supported appellant's contention that the investigation was skewed from its earliest days toward finding appellant guilty of shooting David Gaines. The trial court's failure to allow it blocked appellant from developing his version of how the crime unfolded, improperly protected the prosecution's case investigation, and skewed the jury's view of events in the prosecution's direction.

This error was prejudicial and in and of itself requires reversal. As noted in the statement of the case, the jury deliberated for over 20 hours, hours, and continually asked the trial court for rereads of testimony.

(Statement of the Case, *ante*.) The case was close. It cannot be said beyond a reasonable doubt (*Chapman v. California*, *supra*) that this error had no effect on the outcome of the jury's deliberations. The guilt verdict does not have the reliability required by the Eighth Amendment and due process of law in a capital case (*Beck v. Alabama*, *supra*), and must therefore be set aside.

## IV. FAILURE TO PROVIDE APPELLANT WITH A USABLE COPY OF THE JACK IN THE BOX VIDEOTAPE OF DRIVE-THROUGH PATRONS PREJUDICIALLY VIOLATED APPELLANT'S RIGHT TO DISCOVERY UNDER SECTION 1054.1 AND HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW.

### A. Failure to Provide Exculpatory Evidence

The hotly disputed issue of who purchased the Jack in the Box materials found at appellant's home could have been resolved by a video camera maintained by Jack in the Box; apparently, all cars moving through the drive-in window were videotaped at the time of the crime at bench. In his motion for a new trial, trial counsel complained that he had never been provided a usable copy of the videotape at issue, despite several requests. (10 CT 2658-2659.)

The prosecutor informed the court that Detectives Wuest and Alejandre had viewed the tape somewhere, and informed him that no meaningful information could be gleaned from it. He told the court that counsel had access to the tape, but the tape was not able to play on an ordinary VHS system — it required a special system, which his office did not possess. (37 RT 9777-9783.)

Trial counsel confirmed the prosecutor's narrative, but added that he had been initially told that he would be provided a usable copy of the tape,

or means by which he could watch it, but he was never provided with either one. (37 RT 9784-9785.)

The trial court ruled that the prosecution had met its discovery obligations by making the tape available to counsel, and was under no obligation to provide counsel with the means to actually see the tape: "As to the Jack in the Box tape, in my opinion, so long as Mr. Schick had access to the actual physical evidence, it was not necessary for the prosecutor to search the world to see whether there's proper technology to do the transfer." (37 RT 9791.) This ruling, a triumph of form over substance, was wrong. Counsel was entitled to either a usable copy, or to information that would have enabled him to travel to find and view the videotape.

The prosecution's failure to provide a usable copy of the videotape in question violated appellant's statutory right to discovery and his right to due process of law under the Sixth and Fourteenth Amendments as guaranteed by *Brady v. Maryland* (1963) 373 U.S. 83.

Section 1054.1 requires:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
> . . . (e) Any exculpatory evidence.

We know from the prosecutor's argument against appellant's motion for a new trial that the investigating officers in this case were able to view the videotape. Had the videotape shown evidence of appellant driving his mother's car, the tape would doubtless have been proffered by the prosecution as evidence that appellant had returned to the scene of the crime 45 minutes after it had occurred. No such evidence was proffered. The contents of the videotape were highly likely to be exculpatory.

The prosecutor related a hearsay account of what the tape contained, and told the court that "no meaningful information" could be gleaned from it. But it is likely that information that meant little to investigating officers would have meant much to defense counsel.

Presumably, a chief purpose of the camera was to record information about the cars that pulled up to the window so that anyone who fled without paying for their food could be located. Chances are excellent that the tape recorded a series of quite distinguishable cars around 12:00 a.m. that did not include either the car ostensibly driven by appellant, or his sister's car. His sister was likely to have bought a burger and french fries at a time later than 12:02 a.m. What would have been an absence of meaningful information to investigating officers, i.e., the failure to see any recognizable cars, would have been extremely useful to appellant and his defense.

Here, the prosecutor relied on the letter of the law, but violated its spirit. He made available an unwatchable tape that he represented as being the Jack in the Box videotape, but did not provide appellant with any way or means to make use of a otherwise indistinguishable lump of plastic. The trial court erred by licensing this successful effort to keep from appellant access to a visual record of just who came through the Jack in the Box on 6200 Pacific Avenue just after midnight on June 12, 1999.

**B. Materiality of the Videotape(s)**

Failure to provide appellant with meaningful access to the videotape in question was prejudicial. To constitute a *Brady* violation in the criminal context, three elements must be met. (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.) First, the State must have suppressed some evidence, either purposefully or inadvertently. (*Id.*) Second, the evidence must be favorable to the accused because it is either exculpatory or impeachment material. (*Id.*) Third, the evidence must be material to the outcome. (*Id.*)

Evidence is material for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 681-682.) The inquiry at hand is "not whether the defendant would more likely than not have received a different verdict with the

evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*Kyles v. Whitley* (1995) 514 U.S. 419, 434; *In re Brown* (1998) 17 Cal.4th 873, 886-887.) "[I]n determining whether evidence was material, 'the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.' [Citation.]" (*In re Steele* (2004) 32 Cal.4th 682, 700-701.)

In the criminal context, *Brady* imposes a "no fault" obligation upon prosecutors to turn over exculpatory evidence. (See *Brady*, 373 U.S. at p. 87.) A prosecutor's withholding of exculpatory material evidence is grounds for a new trial, whether the withholding was innocent, negligent, or intentional. (*Id.*)

The Jack in the Box dispute was important to the prosecutor not only to show that appellant was somewhere relatively close by (0.6 mile) later that evening, but also to discredit appellant's sister, the owner of the house in which appellant lived, and a key witness. He argued that Nina Tahod conspired with appellant to lie about timing. (30 RT 7873-7874.) If that were true, it would undermine the integrity of the defense, and cast doubt on every aspect of its presentation. The prosecutor referred to it again as a key reason to reject appellant's motion for a new trial. (37 RT 9768.)

Appellant, on the other hand, argued that the receipt at issue was mistaken; that it was indeed Nina who had gone to the Jack in the Box, albeit at a different time, as shown by the items in the Jack in the Box bag, which did not correspond with the receipt. (30 RT 7920-7924.)

The evidence at issue would likely have not shown either of the cars at issue as having gone through the Jack in the Box at the time stamped on the receipt. Were that so, it would not only support appellant's version of events negating any trip by him to the Jack in the Box, but it would also support Nina's extensive testimony about timing, about the disposal of the bowl and its lid, and about her brother David (see 27 RT 6990-7070) and Raymond Padilla, who testified in support of her account of the night of June 11, 1999. (29 RT 7504 et seq.)

As described above in the Statement of the Case, this was a close case, in which the jurors took over four days, and deliberated for over 20 hours. In considering the prejudice cause by the failure to disclose exculpatory evidence, the issue is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. (*Kyles v. Whitley*, *supra*; *In re Brown*, *supra*.)

This issue consumed a significant portion of this trial. The prosecutor called witnesses and presented evidence that Nina's car was being towed at the time the receipt was stamped. He used this incident to attack the integrity of appellant's case at least as much as he argued that appellant was for some reason at a Jack in the Box half a mile away from the crime scene 45 minutes later. During deliberations, the jury asked for a reread of Nina's testimony, police testimony about her interview, and the testimony of her fiancee Raymond Padilla (29 RT 7504 et seq.), which dealt solely with the evening of June 11, 1999, his meeting with Nina and the party they attended where she was locked out of her car. (6 CT 1520-1521.)

Had the evidence not been withheld, it is likely that none of this evidence or argument would have appeared to undercut appellant's defense. Given how close was this case, this Court cannot be confident that appellant's jury would have reached the same result had the prosecutor provided appellant with an opportunity to actually view the tape in question. (*In re Steele*, *supra*, 32 Cal.4th at pp. 700-701.)

## V. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY AS TO HOW CIRCUMSTANTIAL EVIDENCE WAS TO BE CONSIDERED IN THIS PARTICULAR CASE.

On February 12, 2001, trial counsel submitted proposed jury instructions to the court. (Exh. LZ 67.)[19] His first instruction concerned circumstantial evidence. It modified CALJIC No. 2.01[20] to replace language related to innocence with language referring to a lack of proof of guilt. The proposed instruction read as follows: "Also, if the circumstantial evidence [as to any particular count] is susceptible of two reasonable interpretations, one of which points to a finding of guilt and the other to a finding *that guilt has not been proven*, you must adopt that interpretation which points to a finding *that guilt has not been proven* and reject that interpretation which points to a finding of guilt." (Exh. LZ 67, p. 1.)

Counsel also submitted a related instruction directly tethered to his theory of the case: "If the evidence permits two reasonable interpretations,

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[19] Counsel's proposed jury instructions were court's exhibits, and have not been made part of the appellate record. Appellant therefore is attaching the two relevant instructions to this brief as an appendix.

[20] In 2001, and today, CALJIC No. 2.01 provided as follows: "Also, if the circumstantial evidence [as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt."

one of which points to the guilt of the defendant and the other to the guilt of [David Zaragoza], you must reject the interpretation that points to defendant's guilt and return a verdict of not guilty." (Exh. LZ 67, p. 2.)

The trial court allowed the first modification, but rejected the second. (26 RT 7689-7690; 5 CT 1350, 30 RT 7753.) The court stated that since it was a possibility that both appellant and his brother could be guilty, the court was concerned the jury might misunderstand its task. (26 RT 7690.) The court's failure to give this proposed modification was prejudicial error.

CALJIC No. 2.01 is a central part of California's jurisprudence regarding the standard of reasonable doubt in a case based on circumstantial evidence, which is in turn at the heart of the criminal justice guarantees set forth in the due process provisions of the federal constitution. (See, e.g., *Cage v. Louisiana* (1990) 498 U.S. 39, 40-41.) Specifically, "CALJIC No. 2.01 clarifies the application of the general doctrine requiring proof beyond a reasonable doubt to a case in which guilt must be inferred from a pattern of incriminating circumstances." (*In re Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1095, citing *People v. Gould* (1960) 54 Cal.2d 621, 629; see also *People v. Watson* (1956) 46 Cal.2d 818, 831, cert. den., (1957) 355 U.S. 846 [discussing the predecessor pattern instruction].)

In *People v. Bender* (1945) 27 Cal.2d 164, the only evidence that defendant had killed his wife was circumstantial evidence. He complained on appeal that the trial court should have instructed to the effect that a guilty verdict required facts which could not be rationally reconciled with any theory other than guilt. *Bender* stated: "It cannot be too strongly emphasized that such [an instruction] enunciates a most important rule governing the use of circumstantial evidence. In unequivocal language it should be declared to the jury in every criminal case wherein circumstantial evidence is received." (*Id.* at p. 175.)

This Court has consistently taught that, whenever the prosecution depends substantially on circumstantial evidence for proof of guilt, "the [trial] court on its own motion [must give] an instruction embodying the principle that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but *must be inconsistent with any other rational conclusion.*" (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [emphasis added]; accord, *People v. Marquez* (1992) 1 Cal.4th 553, 577.)

A defendant, upon proper request, has a right to an instruction to direct the jury's attention to evidence from which a reasonable doubt of his guilt could be inferred. (*People v. Sears* (1970) 2 Cal.3d 180, 190.) A

defendant has a right to tailored instructions which relate the standard of reasonable doubt to the evidence in a particular case. (*People v. Earp* (1999) 20 Cal.4th 826, 886; *People v. Wright* (1988) 45 Cal.3d 1126, 1136-1138; see generally 21 Cal.Jur.3d (2008) Criminal Law: Trial, § 323.) "'In a proper instruction, "[w]hat is pinpointed is not specific evidence as such, but the theory of the defendant's case."' [Citation]." (*People v. Ledesma* (2006) 39 Cal.4th 641, 720.)

A trial court "need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation]." (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) Appellant's proposed modification is supported by substantial evidence, is not argumentative, and is not duplicated by any other instruction.

Though technically correct, the trial court's factual basis for rejecting appellant's proposed instruction overlooks the determinative fact that only one person shot David Gaines. The nature of the wounds permits no other interpretation. The prosecutor never argued that David Zaragoza shot David Gaines while appellate robbed William Gaines, or stood passively by.

Nothing placed appellant at the scene of the crime, or showed that he had fired the shots that killed David Gaines. The case against appellant was

based entirely on circumstantial evidence. Instructions directing the jury how to consider the evidence and theories presented by both parties were crucial.

Appellant had an alternative theory of how the crime was committed, and showed the jury an animated reenactment of the crime, but he was *not* required to present a more convincing theory than the prosecutor. He was only required to create reasonable doubt in order to prevail. The instruction at issue would have made this distinction clear in the precise context of this case. It would have helped keep the jury from simply comparing the two theories and voting for the one which seemed more persuasive.

In *People v. Rogers* (2006) 39 Cal.4th 826, this Court found that the trial court erred in failing to give CALJIC No. 2.01, where the prosecution's case relied on two pieces of circumstantial evidence. The error was harmless, however, because the judge did give CALJIC No. 2.02 (circumstantial evidence of specific intent, or mental state) and the error could therefore only have affected the issue of identity, on which there was strong circumstantial evidence of defendant's guilt; he admitted killing another woman with the same weapon, and there was no evidence that anyone else had access to the weapon. Furthermore, defendant did not deny

the killing at issue in his testimony before the jury. (*Rogers*, 39 Cal.4th at p. 885.)

Here, it was precisely the issue of identity that was at stake in the trial of guilt or innocence. There was direct evidence of one person's presence — David Zaragoza. Only circumstantial evidence supported Appellant's guilt. Appellant was entitled to have the jury accurately instructed on precisely what its burden was in determining if there was reasonable doubt that appellant did the shooting, in the context of David Zaragoza being recognized as the shooter named by defendant in his theory of the case.

In *People v. Fuentes* (1986) 183 Cal.App.3d 444, two brothers were accused of firing a gun at passers-by from a moving vehicle. Only one of them could have been guilty of personally firing the weapon. Evidence against the defendant was entirely circumstantial. The court of appeals reversed, because the jury was not given CALJIC No. 2.01: "[h]ad the instruction in question been given, the jury might have concluded that the circumstantial evidence, while entirely consistent with defendant's guilt, was also consistent with a rational conclusion that he was innocent.'" (*Fuentes*, 183 Cal.App.3d at p. 456.)

The entirely circumstantial evidence that was submitted in that regard was susceptible to more than one rational conclusion. (*People v. Yrigoyen*, *supra*, 45 Cal.2d at p. 50.) The trial court's failure to instruct the jury on what the law requires under such circumstances was error, and that error cannot be dismissed as harmless. (*Ibid.*) "Since there is conflicting evidence in the case before us, regarding appellant's identification, we too must conclude that the error was prejudicial." (*People v. Fuentes*, *supra*, 183 Cal.App.3d at p. 456.)

The *Fuentes* court, noting that the jury in that case had deliberated for more than nine hours, declared that its decision to reverse the judgment was "influenced by the fact that the jury did not find this to be an easy case." (*People v. Fuentes*, *supra*, 183 Cal.App.3d at p. 456.) This case was relatively straightforward, and involved evidence of only one incident. Nonetheless, the jury deliberated over four days, and for over 20 hours.

The error was prejudicial. On appeal, this Court reviews issues of instructional error de novo. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 217 ["[A]n appellate court reviews a trial court's instruction independently"].)

Instructions of the burden of proof and how the jury was to weigh the evidence were crucial in this case. Failure of the trial court to give the pinpoint instruction proffered by appellant was a miscarriage of justice.

"An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) This error had a substantial and injurious effect or influence in determining the jury's verdict. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 623.) Appellant's convictions should be set aside.

## VI. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY TO TAKE INTO ACCOUNT THE PRESENCE OR ABSENCE OF DAVID ZARAGOZA'S MOTIVE FOR THE KILLING.

The trial court also refused proposed instruction No. 3, a modification of CALJIC No. 2.51, which focused the jury's intention on the question of motive as it applied to both appellant and David Zaragoza.[21] CALJIC No. 2.51 as read to the jury (6 CT 1450, 30 RT 7758) makes no reference to motive in conjunction with a specific party, but in context it clearly refers to the defendant and no one else; "presence of motive" in a third party such as David Zaragoza would not "tend to establish guilt" of a defendant charged at trial.

Pattern motive instructions like CALJIC No. 2.51 refer to the defendant and no one else. Where evidence of the guilt of a third party is presented, as in this case, the jury should also be directed to consider the third party's motive in determining whether the third party evidence raises a reasonable doubt as to the defendant's guilt. (*People v. Ofunniyin* (N.Y.

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[21] The proposed instruction, part of Exhibit LZ 67, is attached hereto. It read as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive IN THE DEFENDANT OR [insert name of third party] may tend to establish THAT PERSON'S guilt. Absence of motive IN THE DEFENDANT OR [insert name of third party] may tend to establish THAT PERSON'S innocence. You will therefore, give its presence or absence, as the case may be, the weight to which you find it to be entitled." (Exh. LZ 67, p. 6.)

1985) 495 N.Y.S.2d 485 [flight of codefendant is relevant to defense that codefendant is guilty and non-fleeing defendant is not guilty]; see also Charges to the Jury and Requests to Charge in a Criminal Case (West/Leventhal, 1990) 4:45 [General Instructions–Flight–Commentary]; *Winfield v. United States* (D.C. App. 1996) 676 A.2d 1, 6 [evidence that third party possessed motive to kill murder victim and had attempted to do so in recent past was improperly excluded at trial, despite absence of evidence placing third party at or near murder scene].)

A defendant, upon proper request, has a right to an instruction to direct the jury's attention to evidence from which a reasonable doubt of his guilt could be inferred. (*People v. Sears*, *supra*, 2 Cal.3d at p. 190.) A defendant has a right to tailored instructions which relate the standard of reasonable doubt to the evidence in a particular case. (*People v. Earp*, *supra*, 20 Cal.4th at p. 886; *People v. Wright*, *supra*, 45 Cal.3d at pp. 1136-1138; see generally 21 Cal.Jur.3d (West, 2008) Criminal Law: Trial, § 323.) "'In a proper instruction, "[w]hat is pinpointed is not specific evidence as such, but the theory of the defendant's case."' [Citation.]" (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 720.)

A trial court "need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or

is not supported by substantial evidence [citation]." (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) Appellant's proposed modification is critical because it directs the jury to consider what is the heart of his defense. It is supported by substantial evidence, is not argumentative, and is not duplicated by any other instruction.

The instruction given did not only suffer from generality; by omitting entirely any reference to David Zaragoza's motive, it implied that such a consideration was not as important, or even relevant, and thereby actively distorted the jury's process of considering the evidence before it.

David Zaragoza was using illicit street drugs in the spring of 1999, which cost money. Appellant, on the other hand, had no apparent need of additional money. His expenses were very low, and he had two uncashed paychecks at the time of his arrest. Where, as here, substantial evidence of the guilt of a third party is presented, CALJIC No. 2.51 should be modified to allow the jury to consider that party's motive in determining whether evidence related to David Zaragoza raised a reasonable doubt as to appellant's guilt.

This error was prejudicial. On appeal, this Court reviews issues of instructional error de novo. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 217 ["[A]n appellate court reviews a trial court's instruction independently"].)

Instructions of the burden of proof and how the jury was to weigh the evidence were crucial in this case. Appellant argued that David Zaragoza committed this crime alone. Failure to the trial court to give the pinpoint instruction proffered by appellant meant that the jury was not charged with giving the same consideration to the presence or absence of David Zaragoza's motive as to any motive appellant may have had. This failure was a miscarriage of justice.

"An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) It is reasonably probable that had the jury been directed to consider whether or not David Zaragoza had a greater or lesser motive to commit this crime, the jury would have rejected a finding of guilt.

As in *People v. Fuentes*, *supra*, another case where one sibling was charged and convicted where the evidence could well have supported the guilt of the other sibling, failure to properly instruct the jury was prejudicial. This case was close; the jury deliberated over 20 hours, and frequently asked for rereads of different portions of testimony. This error had a substantial and injurious effect or influence in determining the jury's

verdict. (*Brecht v. Abrahamson*, *supra*, 507 U.S. at p. 623.) Appellant's convictions should be set aside.

## VII. THE TRIAL COURT ERRED IN NOT SUPPRESSING APPELLANT'S STATEMENTS AS SEIZED IN VIOLATION OF THE FOURTH AMENDMENT.

On October 10, 2000, trial counsel filed a motion to suppress evidence. The evidence he sought to suppress was "a glass bowl found at the residence of 429 S. Airport Way" found on June 13, 1999, and labeled BW23 in evidence gathering by the sheriff's deputies, and "all statements made by appellant on June 13 and June 14, 1999." (4 CT 1030.) The basis of the motion was that the arrest of appellant and earlier seizure of the evidence was done without a warrant, and pursuant to section 1538.5, subdivision (i), there was insufficient probable cause to justify the arrest and seizure of the evidence. (4 CT 1028-1029.)

The prosecutor filed an opposition to the motion on November 21, 2000, as well as a separate motion to introduce appellant's statements. (4 CT 1055 et seq.; 4 CT 1065 et seq.) A hearing was held on November 22, 2000. (17 RT 4335 et seq.) After discussion the parties stipulated that the deputies had not obtained a warrant before taking appellant's statements or searching his home, and that appellant had no expectation of privacy rights regarding the materials found outside his home in a garbage can. (17 RT 4346-4347.) Accordingly, the only disputed evidence remaining were appellant's statements to the case investigators.

Detective Bruce Wuest testified regarding the case's development. Detective Jerry Alejandre then testified regarding his interviews of neighbors on the night of the crime. (17 RT 4347-4401.) After argument, the trial court denied appellant's motion, finding that there was no unreasonable delay by the authorities in arresting appellant, and that appellant had willingly gone with investigators to the station where he was interviewed. (17 RT 4412-4413.)

The trial court erred in not suppressing appellant's statements.

**A. Lack of Consent**

The admissibility of appellant's statements hinges on whether the consent he gave to the authorities to transport him to their quarters and interview him was freely and voluntarily given, or the product of an implied assertion of authority.

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." (*Bumper v. North Carolina* (1968) 391 U.S. 543, 548-549, fn. omitted.) "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to

be determined from the totality of all the circumstances." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227.)

The question of whether or not consent is the product of implied assertion of authority or a free and voluntary exercise is one of fact that must be decided by the particulars of a given case. (*People v. Lazalde* (2004) 120 Cal.App.4th 858, 864-865; *People v. Poole* (1986) 182 Cal.App.3d 1004, 1013.) Appellant's consent was no more than acquiescence to local authorities, and was not freely and voluntarily given.

**B. Arrest Without a Warrant**

Appellant was arrested at David Zaragoza's mental health clinic on Monday morning, June 14, 1999. (31 RT 9161-9162.) An arrest is a seizure under the Fourth Amendment, and can only be done when there is probable cause under the standards of the state and federal constitutions. Probable cause is assessed by determining "whether the facts contained in the affidavit are such as would lead a man of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion of the guilt of the accused." (*Skelton v. Superior Court* (1969) 1 Cal.3d 144, 150; *Gerstein v. Pugh* (1975) 420 U.S. 103.)

A warrantless seizure is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the

search. (*People v. Redd* (2010) 48 Cal.4th 691, 717-719; *People v. Williams* (1999) 20 Cal.4th 119, 127 [83 Cal.Rptr.2d 275, 973 P.2d 52].)

> The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]

(*People v. Glaser* (1995) 11 Cal.4th 354, 362; see also *People v. Laiwa* (1983) 34 Cal.3d 711, 718.)

The prosecutor's justification for why appellant was arrested included erroneous statements of fact. He asserted that "witnesses had seen the two of them [David and appellant] together that evening" (17 RT 4412), but the only way the authorities learned that they had been together was appellant's own statements during his interrogation. When interviewed, David Zaragoza denied that he was ever with appellant that night. No other witness ever stated that he or she saw them together. The prosecution did not meet its burden of making the requisite showing.

### C. Prejudice

David Zaragoza had denied altogether having been with appellant when questioned, and simply denied having committed the crime or knowing how his papers might have found their way to the Gaines

residence. (See 17 RT 4388, 4411-4412.) Although appellant denied committing the crime or knowing anything about it in his statements, and ultimately defended himself by presenting to the jury the facts he first gave to the investigating officers, his statements contained full and frank accounts of his criminal background, and were used against him in the development of the prosecution's case in both the guilt and penalty trials. There is a reasonable likelihood that the exclusion of the evidence would have changed the result of a trial. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.)

## VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT QUESTIONING FURTHER AND DISQUALIFYING A JUROR WHO WORKED WITH THE VICTIM'S BROTHER, AND WHO ACKNOWLEDGED THAT APPELLANT MIGHT HAVE A "PROBLEM" WITH THE APPEARANCE OF BIAS.

### A. Guilt Phase

The Gaines family was prominent in Stockton. A moment of silence for David Gaines was held at a local college basketball game. (31 RT 8222.) The trial court had to directly order one prominent local judge, a friend of the victim's family and frequent attendee of the preliminary hearing, to leave an "in camera"[22] hearing. Another judge — a close friend of the victim — attended portions of the preliminary hearing. (17 RT 4215-4217.)

In the midst of appellant's trial, attorney Andrew Quinn (David Zaragoza's counsel) reported that he had seen a juror (No. 6) having a friendly contact with two of the Gaines brothers on the street outside the courthouse. (28 RT 7406 et seq.) The trial court heard from Mr. Quinn (28 RT 7410-7414) and elected to again warn all the jurors not to have contact with witnesses or family members. (28 RT 7415.)

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[22] Although the trial court characterized the hearing as an in camera hearing, it was apparently an ex parte hearing, held in the courtroom after all persons in attendance were asked to leave, rather than in chambers. (17 RT 4216.)

On the same day, another juror passed a note to the court saying, "Steve Gaines and myself have talked on the plane[23] before. We both work for Save-Mart. I think this will be no problem, but you should know." (28 RT 7416.)

This juror was called into court. (28 RT 7416.) He testified that he had conversations with Steve Gaines at least three times over the previous three or four months.

| | |
|---|---|
| THE COURT: | Can you avoid contact during this trial? |
| JUROR JN.08: | I will have no choice. |
| THE COURT: | Right. |
| JUROR JN.08: | Yeah. |
| THE COURT: | You will avoid it? |
| JUROR JN.08: | Yes. |
| THE COURT: | Oh, okay. Thank you. Any other questions? |
| MR. SCHICK: | *The only thing, let's suppose — is it somebody that you think you would be having contact again in the future?* |
| JUROR JN.08: | *Oh, I'm positive.* |

[23] It later emerged that they had talked on the phone, not on a plane. (32 RT 8344.)

MR. SCHICK: *Let's say that — that you returned a verdict that's not proper with Mr. Gaines. Would that cause you any problems?*

JUROR JN.08: *I have no idea. That's something you would have to, you know, it's something that could be a possibility.*

THE COURT: Okay. Remember, I don't know, I asked some jurors, maybe not in your presence, I asked some jurors regardless of what your verdict was, would you feel that you had some sort of obligation to explain it to anybody?

JUROR JN.08: No.

THE COURT: Including Mr. Gaines?

JUROR JN.08: No.

(28 RT 7418-7419; emphasis added.)

The juror thus acknowledged, albeit obliquely, that voting in favor of appellant might cause problems for him. His workplace contacts with the victim's brother could not help but influence his deliberations. The trial court had a sua sponte obligation to probe deeper into the effect this improper influence might have during deliberations, and to remove the juror in order to preserve appellant's Sixth Amendment right to a trial "by a panel of impartial, 'indifferent' jurors." (*Morgan v. Illinois* (1992) 504 U.S. 719,

727.) The trial court's failure to do so requires that appellant's convictions and sentence be set aside.

A defendant has a constitutional right to a trial by an impartial jury. (*In re Hamilton* (1999) 20 Cal.4th 273, 293.) An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case *solely* on the evidence before it. (*Id.* at p. 294.) The bias or prejudice of even a single juror violates the right to an impartial jury regardless of whether an unbiased jury would have reached the same result. (*In re Carpenter* (1995) 9 Cal.4th 634, 654; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111.) Accordingly, "[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973 n. 2 (en banc), cert. den., 525 U.S. 1033 [119 S.Ct. 575].)

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. (*In re Oliver* (1948) 333 U.S. 257.) "'[T]he jury's verdict must be based upon the evidence adduced at trial uninfluenced by extrajudicial evidence or communications or by improper association with the witnesses,

parties, counsel or other persons.' [Citation]." (*People v. Bradford* (2007) 154 Cal.App.4th 1390, 1413-1414.)

Juror bias does not require that a juror bear animosity towards the defendant. It can also be shown by favoritism towards the victim and his family. Juror bias exists if there is a substantial likelihood that a juror's verdict was affected by an improper outside influence, i.e., an ongoing work relationship with the victim's brother, rather than on the evidence and instructions presented at trial, and the nature of the influence was detrimental to the defendant. (*In re Hamilton*, *supra*, 20 Cal.4th at p. 294.) In *People v. Honeycutt* (1977) 20 Cal.3d 150, 157-158, this Court held that the verdict must be based solely on the evidence adduced at trial, without any influence from any outside the courtroom.

The trial court is empowered to inquire into possible juror misconduct. (*People v. Keenan* (1988) 46 Cal.3d 478, 532.) Ensuring the sanctity of deliberations and the competency of those who engage in them is, particularly in a capital case, fundamental to the constitutional right of trial by jury. "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased [sic] judgment. Nor can any ground of suspicion that the

administration of justice has been interfered with be tolerated." (*Mattox v. United States* (1892) 146 U.S. 140, 149.)

Juror No. 8 and the victim's brother had talked as part of their mutual employment three times or so within the previous few months, and he was "positive" that their relationship would continue. It was not clear if Steve Gaines had a supervisory position over the juror, who *explicitly agreed that his relationship with Steve Gaines might be a problem for him in deliberating on appellant's fate*. (28 RT 7418-7419.) This juror could not be relied upon to make his decision based only on what he heard and saw during the trial.

Where, as here, a juror's potential bias is discovered during trial, courts must be concerned that the juror's bias will taint the jury's verdict and that the appearance of bias will undermine public confidence in the verdict, and take appropriate action. (See *Caldwell v. State* (Del. 2001) 780 A.2d 1037; *State v. Tody* (Wis. 2008) 764 N.W.2d 737, 744.) The trial court was duty-bound to inquire as to what sort of problem was posed by Juror No. 8's ongoing relationship with the victim's brother.

**B. Prejudice**

As noted above, the juror in question acknowledged talking with the victim's brother at least three times within the previous few months. They

talked before the juror was called, so he had no reason to limit the conversations. The trial court's failure to ask more detailed questions of the juror, who himself stepped forward out of a concern that bias might appear, and who appeared generally forthcoming when answering the question put to him by the court and counsel, violated appellant's right to a trial by impartial, indifferent jurors, not influenced by relationships with the victim's family. Its failure to do so requires that all verdicts against appellant be set aside.

### C. Penalty Phase

After the trial court allowed Sally Gaines, the wife of Steve Gaines, to testify against appellant, trial counsel asked that the juror who worked with Steve Gaines (Juror No. 8) be recalled and questioned about his ability to be impartial. When the court asked Juror No. 8 if the possibility that Sally Gaines might talk about the impact of the loss of David Gaines on Steven Gaines would have any effect on him, he answered, "No." (32 RT 8341.) The trial court then asked counsel if he had any questions.

> MR. SCHICK: I guess the only question we ask, JN.08, is *if you put yourself in my client's position, would you feel uncomfortable to have somebody of your state of mind — especially when we are at the point where you are going to make probably the most significant decision, whether they live or die — would you want*

*somebody in your state of mind making that decision?*

JUROR JN.08: *That's a good question. I don't know how to answer it.*

THE COURT: Let me put it this way, and this may be a way to focus on it: If there were twelve people with your state of mind on the jury, would you feel that — that you had a fair and impartial jury? For this phase?

JUROR JN.08: I — I — I have done everything that I've done by the instructions that you've given us and the law, and that's how I think I would continue to do things.

THE COURT: Mr. Schick. Anything further?

MR. SCHICK: Would you feel — would you feel uncomfortable if you were in his position, knowing how you feel?

JUROR JN.08: Possibly.

MR. SCHICK: Possibly. Does that have a relationship to the fact that you might have to deal with Steve Gaines?

JUROR JN.08: It would be very seldom if any contact that I would ever have with the gentleman. And I think I could be fair and impartial.
But that's your decision to make beyond that. I mean . . .

THE COURT: Anything further?

MR. SCHICK: No.

(32 RT 8341-8344, emphasis added.)

In light of the juror's equivocation in his last answer, counsel challenged him, and asked that he be dismissed. (32 RT 8344.) The trial court refused, saying that even though the juror was equivocal when answering the question about whether appellant had reason to be uncomfortable, he thought the juror understood the duty to be impartial, and that he could be fair. (32 RT 8346.)

The trial court's ruling was wrong. It did not address the acknowledged appearance of bias. The juror himself recognized that there was an appearance of bias in his continuing to serve. He acknowledged that appellant might have a problem with a person like him on the jury, and was evasive when directly asked by the trial court if he were on trial before twelve persons like himself, would he feel that the jury was impartial; Juror No. 8 simply said that he had been following the court's directions, and thought he would continue to do so.

Even if there is no showing of actual bias in the tribunal, due process may be denied if there is a probability of bias. (*Caperton v. A.T. Massey Coal Co., Inc* (2009) 129 S.Ct. 2252.) The American Bar Association has expressed a policy preference for the dismissal of potential jurors who have a personal or social relationship with a witness because such jurors "may be

biased, or give the appearance of bias." (A.B.A. Criminal Justice Trial By Jury Standards (3d Ed.1996) 15-2.5, commentary at p. 161.) Here, the juror in question had something closer still: a professional relationship with the victim's brother.

**D. Prejudice**

In this case, jury deliberated in the penalty phase over four days, in excess of 16 hours. The weight of community sentiment was against appellant. The trial court was well aware of the close attention paid to the trial by the victim's family, and that the victim's friends included members of the San Joaquin County bench. Appellant was not only a member of a minority race, but was on trial for his life. It was critical for him to receive a fair trial by an impartial jury, and that his trial not be besmirched with the appearance of bias. Refusal of the trial court to play close attention to these issues, and to allow evasive answers to stand in the place of full disclosure, requires that appellant's death verdict be set aside.

## PENALTY PHASE

## IX. DUE PROCESS OF LAW NOW FORBIDS THE IRREVOCABLE PENALTY OF DEATH TO BE IMPOSED UNLESS GUILT IS FOUND BEYOND ALL DOUBT.

Even if this Court finds that the evidence is sufficient to support the jury's finding that appellant was guilty of the murder of David Gaines, it cannot reasonably say that appellant committed this crime beyond all doubt. Experience over the past 15 years tells us that there is a significant possibility that the investigators' confirmatory bias led them to a hasty conclusion that, even if based on long experience, was simply wrong. In light of our evolving recognition of this reality, the Eighth Amendment to the United States Constitution now prohibits affirmation a death sentence unless guilt is proven beyond all doubt.

### A. The Constitution Forbids Imposition of Death When a System Generates an Unacceptably High Number of Wrongful Convictions.

Reliability of criminal convictions is a bedrock constitutional requirement, and the goal of the numerous procedural protections guaranteed by the state and federal constitution. The need is greatest in death penalty cases: "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding

difference in the need for reliability in the determination that death is the appropriate punishment." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opn. of Stewart, Powell, and Stevens, JJ.) The need for reliability is no less great in the determination of guilt. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 637.)

Although the possibility of wrongful convictions has been a part of the debate on the death penalty for centuries,[24] the possibility has remained abstract, and the proportions long assumed to be minute. Over 20 years ago, a painstaking effort to identify wrongful convictions asserted that from 1900 through 1985, at least 139 innocent persons were sentenced to death and at least 23 innocent persons were executed.[25] This study sparked considerable controversy in the years following its appearance;[26] but we

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[24] See generally Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1987) 40 Stan. L.Rev. 21, 22. "In the mid-1770s, the British scholar Jeremy Bentham argued that capital punishment differs from all other punishments because '[f]or death, there is no remedy.' Jeremy Bentham, The Rationale of Punishment 186 (Robert Heward ed., 1830) (circa 1775). Bentham recognized that there could be no "system of penal procedure which could insure the Judge from being misled by false evidence or the fallibility of his own judgment," *id.* at 187, and he argued that execution prevents "the oppressed [from meeting] with some fortunate event by which his innocence may be proved. [citation omitted]." (*United States v. Quinones* (2d Cir. 2002) 313 F.3d 49, 63.)

[25] Bedau & Radelet, *supra*.

[26] See, e.g., Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study* (1988) 41 Stan. L.Rev. 121.

now know that wrongful convictions occur at a frequency far greater than even the boldest examiners dared suggest 15 years ago.[27]

A 1996 Department of Justice Report noted that every year since 1989, *in about 25 percent of the sexual assault cases referred to the FBI where results could be obtained (primarily by State and local law enforcement), the primary suspect has been excluded by forensic DNA testing*. Specifically, FBI officials report that out of roughly 10,000 sexual assault cases since 1989, about 2,000 tests have excluded the primary suspect, and about 6,000 have "matched" or included the primary suspect.[28] The National Institute of Justice's informal survey of private laboratories reveals a strikingly similar 26 percent rate. As noted by Peter Neufeld and Barry Scheck, "the consistency of these numbers strongly suggests that postarrest and postconviction DNA exonerations are tied to some strong,

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[27] Huff, Rattner, and Sagarin, authors of the 1995 book Convicted but Innocent, spent more than a decade studying the persistence of wrongful convictions, gathering evidence and assessments from police administrators, sheriffs, prosecutors, public defenders, and judges. The three scholars concluded that about 0.5 percent of persons convicted of felonies are innocent.

[28] See Research Report, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, U.S. Dept. of Justice (June 1996), at 0-3.

underlying systematic problems that generate erroneous accusations and convictions."[29]

The rate of mistakes in rape cases is stunning — and there is every reason to believe that the rate is even higher in robbery cases. Both rape and robbery are crimes of violence in which the perpetrator is often a stranger to the victim. They are both susceptible to the well-documented[30] dangers of eyewitness misidentification, the leading cause of wrongful convictions — a phenomenon restricted to crimes committed by strangers. Such is the case in about three-quarters of robberies, but only a third of rapes. (See Bureau of Justice Statistics, *Criminal Victimization in the United States 2002*, Table 29, cited in Samuel Gross et al., *Exonerations in the United States, 1989 through 2003* (2005) 95 J.Crim.L. and Criminology, No. 2, p. 530.) The nature of the crime of rape means that the victim must

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[29] Research Report, n. 5, pp. xxviii-xxix. In Actual Innocence (2000), Scheck, Neufeld and Jim Dwyer suggest that the true rate of wrongful convictions may be closer to ten percent than to one-half of one percent.

[30] See generally Brian Cutler, ed., *Expert Testimony on the Psychology of Eyewitness Identification*, Oxford University Press (2009); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony* (2003) 54 Ann. Rev. Psychol. 277, 278 (reviewing the literature over the last 30 years). Studies continue to be published regarding this issue. See, e.g., Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy* (2002) 87 J. Appl. Psychol. 112.

spend time with the perpetrator, while robberies are usually quick, and generally involve less immediate physical contact.

As of April, 2004, Gross reported 120 exonerations in rape cases; 88 percent of them involved mistaken eyewitness identification. (Gross et al., *supra*, at pp. 529-530.) There were only three robbery exonerations, all of which include eyewitness misidentifications. Before DNA, the results were dramatically different. A study of all known cases of eyewitness identification in the United States from 1900 through 1983 found that misidentifications in robberies accounted for more than half of all misidentifications, and outnumbered rape cases by more than 2 to 1. (Samuel Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt* (1987) 16 Journal of Legal Studies 395, 413.) The difference in the number of recent exonerations is solely due to the availability of DNA testing in rape cases. (Gross et al., *Exonerations in the United States*, *supra*, at pp. 529-531.) If we had a technique for detecting false convictions in robberies comparable to DNA identification for rapes, robbery exonerations would greatly outnumber rape exonerations.

DNA testing has thus revealed that error of the gravest kind is institutionalized in criminal prosecutions. And capital cases are more, not less, vulnerable to mistake than rapes or robberies. Murder cases generate

the most intense community pressure, which often leads to "confirmatory bias," or tunnel vision, by law enforcement officials who feel the heat. The victims of murder cases are by definition unavailable.[31]

Since 1973 and the reimposition of the death penalty after *Gregg v. Georgia* (1976) 428 U.S. 153, 139 people have been freed from death row after being cleared of their charges. These prisoners cumulatively spent over 1,000 years awaiting their freedom.[32] As the U.S. Supreme Court noted in June of 2002, "we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." (*Atkins v. Virginia* (2002) 536 U.S. 304, 321, n. 25; see also *Ring v. Arizona* (2002) 122 S.Ct. 2428, 2447 (conc. opn. of Breyer, J.), noting the release of the 100th exonerated death row inmate since executions resumed in 1977.)

Prior to the revelations of DNA testing the consensus was best expressed by Justice Learned Hand: "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." (*United States v. Garsson* (S.D.N.Y. 1923) 291 F. 646, 649.) Justice

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[31] See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital cases* (Autumn 1998) 61 Law and Contemporary Problems 123, 129-133; James Liebman, *The Overproduction of Death* (2000) 100 Colum.L.Rev. 2030.

[32] Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent* (2004) Death Penalty Information Center <http://www.deathpenaltyinfo.org/node/523> [as of June 8, 2010].

Hand's formulation was reversed by Illinois Governor George Ryan, who was confronted with 13 cases of innocent men condemned to death, so many that he finally said, "Our capital system is haunted by the demon of error —error in determining guilt, and error in determining who among the guilty deserves to die."[33]

The profound shift in our understanding of the error level in serious criminal convictions led to a sweeping rejection of the Federal Death Penalty Act (FDPA) in *United States v. Quinones* (S.D.N.Y. 2002) 205 F.Supp.2d 256. The court held the FDPA unconstitutional because "it not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive due process." (*Quinones*, 205 F.Supp.2d at p. 257.) The court so held because: (1) In recent years, an extraordinary number of death row inmates have been exonerated, in some cases, after they came within days of execution—these exonerations, especially those based on DNA evidence, have opened a window on the workings of our system of determining guilt

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[33] Governor George H. Ryan, Speech at the Northwestern University School of Law (Jan. 11, 2003) [hereinafter Ryan Speech], <http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/dePaulAddress.html> [as of Dec. 12, 2010].

in capital cases, and have shown that the risk of wrongful executions is far higher than anyone used to believe; (2) nothing about the procedural structure of federal capital litigation affords any special protection against that risk. (*Id.* at pp. 266-268.)

On appeal, the district court's decision was reversed. (*United States v. Quinones* (2d Cir. 2002) 313 F.3d 49.) The Second Circuit found that the likelihood of an innocent person being executed had long been a part of the debate over the death penalty's propriety in both Europe and the United States:

> [T]he argument that innocent people may be executed — in small or large numbers — is not new; it has been central to the centuries-old debate over both the wisdom and the constitutionality of capital punishment, and binding precedents of the Supreme Court prevent us from finding capital punishment unconstitutional based solely on a statistical or theoretical possibility that a defendant might be innocent.

(*Quinones*, *supra*, 313 F.3d at p. 62; see generally 313 F.3d at pp. 63-66.)

The court of appeals further found that no lower court could hold that the death penalty was unconstitutional, in light of three specific references to the death penalty in the U.S. Constitution, and the U.S. Supreme Court's decisions in *Gregg v. Georgia*, *supra*, 428 U.S. 153, and *Herrera v. Collins* (1993) 506 U.S. 390; the court interpreted *Gregg* as foreclosing a challenge to the death penalty as unconstitutional per se, and

*Herrera* as foreclosing any challenge to a death penalty scheme on grounds that it led to the execution of innocent people. (*Quinones*, *supra*, 313 F.3d at pp. 61-62, 67-70.)

The court's assertion that fear of executing an innocent person is no different now than at any time in our country's history is wrong. It simply picked statements from philosophers and death penalty opponents over the past 230 years warning of the irrevocable nature of death as a penalty and the danger of convicting innocent people, and did not acknowledge, let alone refute or minimize, what moved the district court to hold the FDPA unconstitutional: the abstract possibility of error has been made concrete in the last 15 years. Error has occurred, and is occurring, at a massively greater rate than anyone believed possible.

The Second Circuit's reading of the *Herrera* decision is likewise wrong. In her concurring opinion in *Herrera,* Justice O'Connor, joined by Justice Kennedy, wrote: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed . . . *the execution of a legally and factually innocent person would be a constitutionally intolerable event.*" (*Herrera*, 506 U.S. at p. 419, emphasis added.) Given the tenor of the dissent, 506 U.S. at p. 430 (dis. opn. by Blackmun, J., in which Stevens

and Souter, JJ., join), on this issue Justice O'Connor spoke for a majority of the Court.

Herrera had claimed that he was factually innocent, and could prove it with evidence that had only become available after trial. He had argued that the execution of an individual who is known to be innocent violates the Constitution. On his *factual* claim, the Court's reaction is best summarized in Justice O'Connor's pivotal concurring opinion: "Petitioner is not innocent, in any sense of the word." (*Herrera*, *supra*, 506 U.S. at p. 419.)

In *Herrera,* the Court was not asked to pass on the constitutionality of a system that repeatedly executes innocent people, and it had no record of such a systemic problem before it. As a result, the *Herrera* opinions deal solely with the rights of an individual defendant who had claimed (unpersuasively) to be able to prove that he was innocent after he had exhausted all ordinary remedies for direct and collateral review. The Court's discussion of the issues points in the opposite direction from the Second Circuit's description. The high court says that the execution of innocent defendants *is* a matter of critical constitutional importance.

In *Gregg* and its companion cases, the U.S. Supreme Court held (1) that the death penalty is not intrinsically unconstitutional (428 U.S. at p. 187), and (2) that three of the five death penalty statutes before the Court

contained adequate procedural safeguards to avoid the arbitrary imposition of death sentences that had been condemned in *Furman v. Georgia* (1972) 408 U.S. 238. (*Gregg*, 428 U.S. at p. 207; *Proffitt v. Florida* (1976) 428 U.S. 242, 259-260; *Jurek v. Texas* (1976) 428 U.S. 262, 276.) Neither of those issues is raised here. But there is another holding in *Gregg* (and in *Furman*) that is pertinent: (3) that the constitutionality of the death penalty must be examined and re-examined in light of "the evolving standards of decency that mark the progress of a maturing society." (*Gregg*, 428 U.S. at p. 173, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 101.)

The Supreme Court repeatedly has relied on that third holding to declare unconstitutional specific applications of the death penalty and procedures used to administer it.[34] In many of these cases following *Gregg,* the Court has applied new information and new arguments to old procedures, and has found them wanting. In *Roper v. Simmons* (2005) 543 U.S. 551, the high court reversed its decision in *Stanford v. Kentucky* (1989) 492 U.S. 361), and held that the execution for an offense committed by a

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[34] (See, e.g., *Woodson v. North Carolina, supra*, 428 U.S. 280; *Coker v. Georgia* (1977) 433 U.S. 584; *Gardner v. Florida* (1977) 430 U.S. 349; *Lockett v. Ohio* (1978) 438 U.S. 586; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Simmons v. South Carolina* (1994) 512 U.S. 154; *Thompson v. Oklahoma* (1988) 487 U.S. 815.)

defendant under the age of 18 is unconstitutional. (See also *Atkins v. Virginia, supra*, reversing *Penry v. Lynaugh* (1989) 492 U.S. 302, by holding that mentally retarded persons are categorically exempt from the death penalty.)

The precise issue here — the constitutionality of the beyond-a-reasonable-doubt standard in the face of mounting new evidence that under current procedures it leads to the executions of a substantial number of innocent defendants — has never been addressed by the U.S. Supreme Court. The issue in this case was not decided in *Herrera*, and it has not been addressed in *Gregg* or in any other post-*Gregg* case. The issue did not ripen until recently. It remains undecided to this day. This Court's authority to consider it, within the framework created by *Gregg* and subsequent cases, is beyond dispute.

### B. California's Death Penalty Scheme Is Afflicted with All the Factors identified as Leading Causes of False Convictions

The high number of wrongful convictions have made it possible for causal factors to be identified. They are: (1) mistaken eyewitness identifications; (2) false "incentivized" testimony from accomplices and jailhouse informants; (3) false confessions; (4) wrong science; and

(5) official misconduct.[35] One of the most thorough reviews of the sources of wrongful convictions was done in Illinois. Governor Ryan appointed a Governor's Commission to study how and why so many innocent men in his

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[35] National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward (2009); Gould, The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System (2009); Samuel Gross, *Convicting the Innocent* (2008) 4 Ann. Rev. of L. and Social Science 173; *Errors of Justice: Nature, Sources and Remedies* (Cambridge Studies in Criminology) by Brian Forst, Alfred Blumstein (Series Editor), David Farrington (Series Editor) Cambridge University Press (2003); *Innocence Lost . . . and Found: Faces of Wrongful Conviction Symposium* (2006) 37 Golden Gate L.Rev. 1; Kreimer & Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA* (Dec. 2002) 151 U. Penn. L.Rev. 547 [describing several examples of wrongful convictions in Pennsylvania, some based on testimony of jailhouse informants]; Liebman, *The Overproduction of Death* (2000) 100 Colum.L.Rev. 2030 [noting several cases in which jailhouse snitches were used to secure faulty convictions]; Garvey (Ed.), Beyond Repair? America's Death Penalty (2003); Blume, *Twenty-five Years of Death: a Report of the Cornell Death Penalty Project on the 'Modern' Era of Capital Punishment in South Carolina* (2002) 54 S.C. L. Rev. 285; American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: a Guide for Examining the Administration of the Death Penalty in the United States* (2002) Ohio St. L.J., Symposium: Addressing Capital Punishment through Statutory Reform; Scheck et al., *Actual Innocence* (2000) [out of 62 cases in which DNA has exonerated an innocent defendant, 13 cases, or 21 percent, relied to some extent on the testimony of informers]; Keith Findley, *Learning from Our Mistakes: a Criminal Justice Commission to Study Wrongful Convictions* (2002) 38 Cal. Western L.Rev. 333; Stanley Cohen, The Wrong Men: America's Epidemic of Wrongful Death Row Convictions (2003); Warden, *The Snitch System: How Incentivized Witnesses Put 38 Innocent Americans on Death Row* (2002) Research Report, Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern Univ. School of Law.

state could have been sentenced to death, and to "submit to the Governor a written report detailing its findings and providing comprehensive advice and recommendations to the Governor that will further ensure the administration of capital punishment in the State of Illinois will be fair and accurate." The commission included judges, prosecutors and defense lawyers from across the political spectrum, all of whom were familiar with Illinois' death penalty system.[36] On April 15, 2002, after two years of study, the Illinois Governor's Commission issued its Report [hereinafter Illinois Commission Report]. (Report of the Governor's Commission on

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[36] Former federal prosecutor and First Assistant Illinois Attorney General, Judge Frank McGarr served as the Commission's Chairman. (Illinois Commission Report, note 5, at 1.) Judge McGarr spent 18 years on the federal bench and served as Chief Judge of the Federal District Court for the Northern District of Illinois between 1981 and 1986. (*Id.*) A former member of the Illinois General Assembly and the United States Congress, Senator Paul Simon served as Co-Chair. (*Id.*) Since he retired from the United States Senate in 1997, Senator Simon has been a professor at Southern Illinois University and Director of its Public Policy Institute. (*Id.*) Thomas P. Sullivan also served as Co-Chair. Formerly a United States Attorney for the Northern District of Illinois from 1977 to 1981, Mr. Sullivan is now in private practice at Jenner & Block. (*Id.*) The Commission included six former prosecutors, four current or former defense lawyers, and two current or former judges: Judge McGarr and Judge William H. Webster. (*Id.*) Refer to the "Commission Members" section of the Illinois Commission Report for more information. (Commission Members, Illinois Commission on Capital Punishment <http://www.idoc.state.il.us/ccp/ccp/member_info.html>.)

Capital Punishment (Apr. 15, 2002) <http://www.idoc.state.il.us/ ccp/ccp/reports/commission_report/ index.html> [as of Dec. 12, 2010].)

The Commission found that the primary problem, from which many others flow, is the intense community pressure on law enforcement authorities to resolve horrific cases. This pressure leads to tunnel vision,[37] or "confirmatory bias," the premature closing off of investigative leads, directive interviews of suspect and witnesses, provision of irresistible favors to informants and accomplices, and misuse of science. Community pressure can make officials desperate enough for resolution to commit misconduct; which is present in a high percentage of known wrongful convictions.

There is no evidence in this case of official misconduct. However, it is a classic case of confirmatory bias. Once the investigators learned of appellant's past criminal record, they dropped all consideration of the possibility that David Zaragoza executed this crime himself. They did not

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[37] The Illinois Commission Report suggests that tunnel vision occurs "where the belief that a particular suspect has committed a crime often obviates an objective evaluation of whether there might be others who are actually guilty." (Illinois Commission Report at p. 20.) Officers become so convinced that they have arrested the correct person that they often ignore information pointing in another direction. (*Id.* at 20-21; see also Stanley Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England* (2000) 68 Fordham L.Rev. 1379.)

make a thorough search of David Zaragoza's home in looking for the murder weapon or bloody clothing, did not do any gunshot residue test of David or his belongings, though they made thorough gunshot residue tests of appellant's body, clothes, and watch, and did not search for David's fingerprints on the steering wheel of the car that the investigators believed was driven by appellant. The investigators "knew" within two days of the crime that appellant was the killer, and thereafter aimed only at developing evidence to prove that point.

The Illinois Commission Report's recommendations were designed to combat the influence of confirmatory bias by training and by particular procedures to eliminate the effect of various forms of witness direction. The first 19 recommendations are concerned with police and pre-trial procedures, and with accuracy in catching the real perpetrator. An additional six recommendations relate to informant and accomplice testimony. The recommendations also require police to receive training on

issues that have caused wrongful convictions.[38] None of these recommendations is in effect now in California.[39]

The risk of wrongful executions, wrongful convictions and wrongful death sentences was recognized in the Final Report of the California Commission on the Fair Administration of Justice.[40] The Report noted a significant number of exonerations of people convicted of murder, and made a comprehensive series of recommendations to improve California's system of death penalty trials, appeals, and postconviction challenges to death sentences. (See Final Report, pp. 20-30.)

For over 40 years, the Model Penal Code barred death where "although the evidence suffices to sustain the verdict, it does not foreclose

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[38] See, e.g., Recommendation #16: All police who work on homicide cases should receive periodic training in the following areas, and experts on these subjects should be retained to conduct training and prepare manuals on these topics: (1) The risks of false testimony by in-custody informants ("jailhouse snitches"). (2) The risks of false testimony by accomplice witnesses. (3) The dangers of tunnel vision or confirmatory bias. (4) The risks of wrongful convictions in homicide cases. (5) Police investigative and interrogation methods. (6) Police investigating and reporting of exculpatory evidence. (7) Forensic evidence. (8) The risks of false confessions. (Illinois Commission Report, p. 40.)

[39] A meticulous comparison of the Commission's recommendations with current California practice was made by Robert Sanger in *Comparison of the Illinois Commission Report on Capital Punishment with The Capital Punishment System in California* (2003) 44 Santa Clara L.Rev. 101.

[40] California Commission on the Fair Administration of Justice, *Final Report and Recommendations* (April 2008).

all doubt respecting the defendant's guilt." (See Margery Malkin Koosed, *Averting Mistaken Executions By Adopting The Model Penal Code's Exclusion Of Death In The Presence Of Lingering Doubt* (2001) 21 N. Ill. U. L.Rev. 41, 50-51, quoting Model Penal Code § 210.6(1)(f).) The commentary notes that "[t]his provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains, the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal." (*Ibid.*)

Although this aspect of the American Law Institute's Model Penal Code was never adopted, the institute created the modern framework for the death penalty, one adopted by Georgia and relied on by the high court when capital punishment was reinstated in 1976. (See *Gregg v. Georgia*, *supra*, 428 U.S. at pp. 189-191.)

However, citing "the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment," the American Law Institute retracted its guidelines for administration of the death penalty in the United States in April of 2009.[41]

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[41] See Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty, Executive Committee of the American Law Institute (April 2009).

A study commissioned by the institute said that decades of experience had proved that the system could not reconcile the twin goals of individualized decisions about who should be executed and systemic fairness. It added that capital punishment was plagued by racial disparities; was enormously expensive, and carried a significant risk of executing innocent people.

### C. Conclusion

In *Unites States v. Quinones*, the district court wrote, "[t]he best evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed, and that, on the other hand, convincing proof of their innocence often does not emerge until long after their conviction." (*Quinones*, 205 F.Supp.2d 256, 257.) As of November 2010, California's system has about 695 people on its death row. Most have never had their cases thoroughly reviewed by the courts, and many do not even have lawyers to initiate a review. It is highly likely that many of those now on California's death row are innocent of the crimes for which they were convicted, or of the aggravating circumstances that led to their punishment.[42]

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[42] The irrevocable nature of the death penalty means that no remedy is now available for Thomas Thompson, despite the exposure of key witness and jailhouse informant Edward Fink as a liar in the Thomas Goldstein case, the use by the prosecutor of completely inconsistent theories in two separate trials, and the courts' refusal to consider evidence completely

All aspects of criminal investigation and prosecution that have been identified as productive of wrongful convictions in capital cases are inherent parts of California's criminal justice system. There is no reason to believe they are not having the same effect in California.

This Court's review of the sufficiency of evidence upholding any criminal conviction, including those making a defendant eligible for death, is set out above, in Argument I. This standard has been in effect around the country for several decades, and was the controlling standard for *hundreds* of felony convictions now known to have been erroneous. However adequate it may be for criminal cases in which life or death is not at stake, it should not guide juries or reviewing courts in capital cases.

This Court has thus far rejected claims that death penalty cases require a standard of proof higher than beyond a reasonable doubt. (*People v. Riel* (2000) 22 Cal.4th 1153, 1182; *People v. Kaurish* (1990) 52 Cal.3d 648, 706.) Both these cases simply cited the plurality opinion in *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-175, without further analysis. Neither this Court nor the U.S. Supreme Court has yet confronted the new reality of

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undermining the prosecutor's theory of the case because it was introduced too late. "Without question if Thompson's claims were being litigated today he would be granted a new trial." (Andrew Love, *Too Late for Justice*, L.A. Daily J. (Mar. 14, 2005).)

criminal trials exposed by DNA testing and other post-conviction investigations in criminal trials — a significant percentage of capital cases are so flawed that innocent people are convicted and sentenced to death for crimes they did not commit. Even if the odds are 90 percent in favor of the accuracy of a guilt finding, there are now many innocent people sitting on California's Death Row.

Aside from the complex revamping of criminal procedure along the lines of the Illinois Commission Report, which can only be done by the legislature, this number could be severely limited by simply requiring that proof of guilt in such cases be beyond all doubt. Since we now know beyond all doubt that innocent people are routinely sentenced to death, the Eighth Amendment requires that we translate that knowledge into the appropriate burden of proof in cases where death is a potential outcome.

There is a very real possibility that appellant was just as he presented himself — a man who had for the first time in his life gotten a legal driver's license, gone to school, learned a trade, obtained employment, and was a valuable worker who earned a decent wage, and a good family man who was trying to establish a family of his own. To make a mistake here would be an unfathomable, and irrevocable, tragedy.

## X. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT WRONGFULLY EXCUSED TWO LIFE-PRONE JURORS.

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the United States Supreme Court held that capital-case prospective jurors may not be excused for cause on the basis of moral or ethical opposition to the death penalty unless those jurors' views would prevent them from judging guilt or innocence, or would cause them to reject the death penalty regardless of the evidence. Excusal is permissible only if such a prospective juror makes this position "unmistakably clear." (391 U.S. at p. 522, fn. 21.)

That standard was amplified in *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*), where the court, adopting the standard previously enunciated in *Adams v. Texas* (1980) 448 U.S. 38, 45, held that a prospective juror may be excused if the juror's voir dire responses convey a "definite impression" (*Witt*, 469 U.S. at p. 426) that the juror's views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Id.* at p. 424.) The *Witt* standard has long been applied in California. (*People v. Butler* (2009) 46 Cal.4th 847, 859-860; *People v. Avena* (1996) 13 Cal.4th 394, 412.)

*Witt* requires a trial court to determine "whether the juror's views would prevent or substantially impair performance of his duties as a juror in

accordance with his instructions and his oath." (*Witt*, *supra*, 469 U.S. at p. 424.) This Court's duty is to "[E]xamine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would 'substantially impair the performance of [the juror's] duties . . .' was fairly supported by the record." (*People v. Miranda* (1987) 44 Cal.3d 57, 94, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 176.)

Errors in failing to excuse a juror for cause when the juror has stated that he or she would automatically vote to impose the death penalty, where sequestered questioning took place, is harmless unless a defendant exhausts all peremptory challenges in selecting the jury, and a juror to whom the defendant objects remains on the panel. (*People v. Coleman* (1988) 46 Cal.3d 749, 769-771; *Ross v. Oklahoma* (1988) 487 U.S. 81, 89.) However, exclusion for cause of a prospective juror from serving on a capital jury when that juror is in fact qualified to serve is per se reversible error — even when the prosecutor has unused peremptory challenges. (*People v. Heard* (2003) 31 Cal.4th. 946, 950; *Gray v. Mississippi* (1987) 481 U.S. 648.)

Generally, a trial court's rulings on motions to exclude for cause are afforded deference on appeal because, in addition to the content of the answers given, the trial court can consider the tone and demeanor of the prospective jurors, and rely on information not included in the record.

(*People v. Avila* (2006) 38 Cal.4th 491, 529.) However, such deference is not warranted if there is no ambiguity in the prospective juror's answers, and particularly if the trial court relied only on a written questionnaire to excuse a juror.

No deference to the trial court's ruling is warranted when "the trial court's ruling is based solely on the 'cold record' of the prospective jurors' answers on a written questionnaire. . . ." [citation], which is available on appeal. Accordingly, we review the record de novo." (*People v. Thompson* (2010) 49 Cal.4th 79, 100.)

Excusing a prospective juror for cause solely on the basis of a written questionnaire is not automatically unconstitutional. (*People v. Wilson* (2008) 44 Cal.4th 758, 781-790.) However, reliance on written responses alone to excuse prospective jurors for cause is permissible only if "from those responses, it is clear (and 'leave[s] no doubt') that a prospective juror's views about the death penalty would satisfy the *Witt* standard (*Wainwright v. Witt, supra*, 469 U.S. 412 [105 S.Ct. 844] ) and that the juror is not willing or able to set aside his or her personal views and follow the law." (*People v. Wilson, supra,* 44 Cal.4th at p. 787.)

Here, the trial court improperly dismissed life-prone jurors for cause when none existed. In one of the two cases, the court did so solely on the

basis of a questionnaire on which the juror made it clear that despite her moral beliefs about her right to impose the death penalty, she had no general objection to the death penalty, and could follow the law as given to her by the trial court in every respect.

### A. Prospective Juror Esther Reeves-Robinson (No. 129)

Ms. Reeves-Robinson's jury questionnaire is found at 17 CT 4802-4820. On January 9, 2001, the prosecutor argued that she should be dismissed without being questioned on voir dire: "she says that for religious reasons, she does not believe that she has the right to decide if a person has to die. She echoes that sentiment on page 18 several times or a few times." (19 RT 4876-4877.)

Defense counsel responded that she had not indicated any unwillingness to follow the law. (19 RT 4877.) The prosecutor recognized that it was a moral, and not a religious belief, but said, "It's all the same thing. Moral and religious grounds, it's the same thing." (19 RT 4878.)

After the prosecutor pushed again for Ms. Reeves-Robinson's immediate removal, the trial court hesitated, and then ruminated aloud over the questionnaire:

> THE COURT: Question 19 on page 20, do you believe that any religious beliefs you may have would have a substantial impact on your decision in this case?

MR. HIMELBLAU: That was your question.

THE COURT: That was — no. The one above it was really — I thought — was too general. Are any of your answers given above — of course that includes the entire questionnaire, I guess — based on a religious consideration. Yes or no. *She says no.* Then she says somewhat with regard to — you know — okay. I think this person is giving unequivocal — I think this person — you know — person used — presents a substantial impairment to prevent her ability to be neutral, follow the Court's instructions and the religious concerns. I'm going to excuse her for cause."

(19 RT 4879; emphasis added.)

Ms. Reeves-Robinson did say that she had religious convictions that led her to feel that she did not have the right to decide to impose the death penalty. (17 CT 4806, 4817.) However, she also said that her belief was a moral one, and not based on religious considerations. (17 CT 4819.) She was quite clear that she also had a moral belief in following the law, and that she could indeed set aside her own feelings regarding what the law should be, and follow the law as the court explained it to her. (17 RT 4818.)

She wrote that the death penalty was imposed at about the right frequency in California (17 CT 4819); that she would not automatically

impose a sentence of life without possibility of parole (17 CT 4818); she would not refuse to find special circumstances to be true or to consider evidence in aggravation or mitigation because of her personal views (17 CT 4817-4818); and that she would not raise the burden of proof in this case because of the potential death penalty (17 CT 4818).

Ms. Reeves-Robinson did not say anywhere in her questionnaire that she would be so bound by a religious conviction that she could not follow the law as it was given to her by the trial court. In fact, she said the opposite. Ms. Reeves-Robinson wrote that she had no general objections to the death penalty. She affirmed that she would follow the court's instructions in every systemic respect that was presented to her on the questionnaire.

To the extent there was any ambiguity in her answers (i.e., whether her reservations were religious or moral), she could and should have been questioned by the parties in voir dire. The trial court's abrupt dismissal of her deserves no deference by this Court, who now has before it the complete materials relied on by the trial court.

It simply cannot be said that Ms. Reeves-Robinson's questionnaire "leaves no doubt" that she was unable or unwilling to follow the law as instructed. (*People v. Wilson*, *supra*.) Excusing her for cause was per se

reversible error. (*People v. Heard, supra*, 31 Cal.4th. at 950; *Gray v. Mississippi, supra.*) Appellant's death sentence must therefore be set aside.

### B. Prospective Juror Marguerite Felts (No. 16)

Prospective juror Felts is precisely the sort of juror the *Witherspoon* court had in mind to not exclude from the process of picking a death-qualified jury. Her questionnaire (11 CT 3180 et seq.) indicates an unwillingness to impose the death penalty. (11 CT 2000.) However, when the court asked her if she would be able to follow the law as she was instructed, she answered, "Yes."

> THE COURT: Do you have any explanation as to why it was "no" on the questionnaire?
>
> PROSPECTIVE JUROR FELTS: Well, I really don't feel that I should be — should take — or be a part of taking another person's life. But if the law says you — I have never broken the law in my life, and I don't intend to do one now.

(20 RT 5229.)

Ms. Felts was quite emphatic that she could vote for the death penalty, even in this case, if the circumstances warranted. She told the court and counsel that she had no religious or moral or personal beliefs that would keep her from imposing the death penalty. (20 RT 5230.)

In asking that she be dismissed, the prosecutor said that she was "contradictory," "conflicted," and "disingenuous." (21 RT 5383.) Defense counsel correctly observed that she was fairly vehement when questioned by the prosecution in insisting that she could impose the death penalty if he proved his case, and said, "I didn't see the inability to follow the law that I think is required." (21 RT 5384.)

The Court: "I think it's a little more relaxed than that." (21 RT 5384.) After reviewing Ms. Felts's questionnaire, the court ruled, "her equivocal answer points in the direction of substantially impair (sic) the juror's ability to be neutral and follow the Court's instruction so the Court will allow that challenge for cause." (21 RT 5384.)

The court's ruling was wrong. Ms. Felts had not been at all equivocal in her answers when questioned on voir dire about her ability to follow the law. She told both the trial court and the prosecutor quite clearly, and without qualification, that she could do so.

The standard applied by the trial court may have been wrong as well; its belief that the appropriate standard is more "relaxed" than one focusing on one's ability to follow the law is not consistent with *Witt*, *supra*, or this Court's decisions applying the *Witherspoon-Witt* standard.

Dismissal of Ms. Felts for cause deprived appellant of a qualified prospective juror. The trial court failed to account for its finding that she was so substantially impaired that she could not follow the law, in the teeth of her insistence that she was quite capable of following the law, and fully intended to do so. This deprivation of a qualified life-prone juror was reversible error, and requires that the penalty verdict against appellant be set aside. (*People v. Heard, supra.*)

## XI. THE TRIAL COURT ERRED BY NOT FINDING A PRIMA FACIE CASE OF RACIAL BIAS ANIMATING THE PROSECUTOR'S PEREMPTORY DISMISSAL OF HISPANIC JURORS.

On January 12, 2001, peremptory challenges began. After the first two challenges exercised by the prosecutor were exercised on Hispanic persons, trial counsel raised an objection pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89, and *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277, and asked the prosecutor to provide a justification for the two excusals. (21 RT 5448.) The prosecutor argued that pattern alone did not require him to explain himself; a prima facie case could only be established by showing "invidious reasoning." (21 RT 5449.) The trial court agreed. It did not find that a prima facie case was shown, and noted that it had also considered information on the voir dire questions and in the juror questionnaires. (21 RT 5450-5451.)

In response to appellant's new trial motion after proceedings had otherwise come to a close, the prosecutor belatedly sought to refute a "prima facie case" by explaining his actions in discharging the first two Hispanic jurors who came before him. As part of his response to appellant's motion for a new trial filed on May 15, 2001, he wrote that five Hispanic jurors were ultimately seated: Palacios (foreman), Vigil, Matta, Yetner, and Gonzales. (10 CT 2571.) He cited this Court's language in

*People v. Howard* (1992) 1 Cal.4th 1132, to the effect that other relevant circumstances were required, like the nature of the prosecutor's voir dire, and the prospective jurors' individual characteristics. (10 CT 2572.)

Although no prima facie case had been asked for or found, and appellant had been convicted and sentenced to death, the prosecutor proceeded as if it had been. He attached his notes for the two jurors in question (venireperson Lorraine Marie Romero, and Rose Elizabeth Coronado) made during jury selection (10 CT 2580-2583), and highlighted excerpts from their questionnaires and voir dire, arguing that the justification proffered for each of these two challenges was adequate. (10 CT 2573-2575.)

Defense counsel was given very little time to respond to the prosecutor's "motion," or argument submitted as part of his response to appellant's motion for a new trial. At oral argument on appellant's new trial motion, counsel said that only two of the jurors were actually Hispanic — Matta and Palacios. After an extensive discussion between the prosecutor, who explained why he was making this material part of the record at such a late date, the trial court indicated that it was inclined to not allow the new material, and again ruled that no prima facie case had been shown; it continued to believe that it had correctly used the "strong

likelihood" test in determining whether the prosecutor improperly exercised the peremptory challenges. (37 RT 9774-9778.) The trial court applied the wrong test, and reached the wrong result.

"Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias. (*Batson*, *supra*, 476 U.S. at p. 89 [106 S.Ct. 1712]; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) At the time of appellant's trial, a defendant could make a prima facie case of bias only by demonstrating a "strong likelihood" that bias existed. (See, e.g., *People v. Howard*, *supra*, 1 Cal.4th at pp. 1154-1156; *People v. Crittenden* (1994) 9 Cal.4th 83, 117-119.)

> Such a standard was not met by pattern evidence alone.
>
> Although the removal of all members of a certain group may give rise to an inference of impropriety (*Wheeler*, *supra*, 22 Cal.3d at 280), we cannot say this factor was dispositive on the record. . . . [T]he trial court . . . held defendant failed to demonstrate a strong likelihood based on 'all the circumstances of the case' that the prosecutor's exercise of his peremptory challenges was based on group bias.

(*People v. Sanders* (1990) 51 Cal.3d 471, 500-501.)

In *People v. Howard*, *supra*, 1 Cal.4th at pp. 1154-1156, the prosecutor had peremptorily challenged the only two prospective black jurors. In affirming, this Court held "although the removal of all members of a certain group may give rise to an inference of impropriety, especially when the defendant belongs to the same group, the inference is not conclusive." This Court held that, although the elimination of all the black jurors created an "inference" of racial discrimination, such inference did not rise to the level of a "strong likelihood" of racial discrimination, or a "conclusive" inference which was needed to present a prima facie case.

(3) In *People v. Crittenden* (1994) 9 Cal.4th 83, 117-119, the prosecutor had challenged the one and only prospective black juror. This Court, relying on *People v. Howard*, once again held that the standard establishing a prima facie case of discrimination was the "strong likelihood" standard, not the "inference" standard: "[T]he prosecutor's excusal of all members of a particular group may give rise to an inference of impropriety, especially if the defendant belongs to the same group. [T]hat inference, as we have observed, is not dispositive." (*Crittenden*, *supra*, 9 Cal.4th at p. 119.)

The "strong likelihood" standard was rejected by the U.S. Supreme Court in *Johnson v. California* (2005) 545 U.S. 162, 166-168, which held

that a defendant need only raise an inference of bias to make a prima facie case. Here, counsel did so, but he was given no opportunity to develop his contention.

The prosecutor's effort to account for his actions was made entirely too late. Trial counsel had no meaningful opportunity to respond, and the trial was entirely over except for the motion for new trial and the sentencing of appellant. This Court will review a trial court's denial of a motion premised upon the improper use of a peremptory challenge with deference, examining only whether substantial evidence supports its conclusions. (*People v. Cox* (2010) 187 Cal.App.4th 337, 342; *People v. Mills* (2010) 48 Cal.4th 158, 176.) However, there is nothing to review, because the trial court mistakenly failed to find that a prima facie case had been made.

In *People v. Hawthorne* (2009) 46 Cal.4th 67, the trial judge also used the mistaken standard, but the court did ask the prosecutor to provide explanations for her actions. This Court then reviewed the record independently (applying the high court's standard) to resolve the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race, and found no prima facie case. (*Id.* at pp. 79-80.)

Here, there is nothing to review — other than the prosecution's after-the-fact justifications presented months later as a "motion to perfect the record," as part of his response to the motion for a new trial. Defense counsel had little time to prepare his response (see 37 RT 9722-9724, where the trial court seemed ready to strike the additional materials in the prosecution's opposition that were not responding to appellant's motion), but said that the prosecutor's claim that five Hispanic jurors were seated was wrong; in fact, there were only two.

The trial court was not interested after the trial in making any factual findings, and did not do so. The trial reiterated its earlier ruling, and reiterated its belief that the requisite showing was of a "strong likelihood" that race was a motivating factor. (37 RT 9788-9791.) For the reasons set forth above, both the standard applied and the result reached were in error. Appellant's death sentence must therefore be set aside.

## XII. THE TRIAL COURT ERRED IN ALLOWING EXTENSIVE VICTIM IMPACT EVIDENCE TO BE PRESENTED.

In the notice of penalty phase evidence provided to appellant on November 21, 2000, the prosecutor listed seven family members of the victim. (7 CT 1761.) On March 2, 2001, appellant moved to limit the presentation of such evidence. (7 CT 1755 et seq.) On March 5, 2001, the prosecutor filed a response to appellant's motion. (7 CT 1767 et seq.)

The motion was argued on March 6, 2001. The prosecutor claimed that he had actually been very modest in his witness list in light of the community outcry over this crime: "I have refused the neighbors, the customers, the friends and the acquaintances, the multitudes that showed up at the funeral, the moment of silence at the UOP basketball game . . . this has had a huge impact." (31 RT 8222-8223.)

Trial counsel pointed to how involved the Gaines family had been throughout the trial, with family members present every day, often responding loudly to the evidence presented. He urged the court to limit this testimony. (31 RT 8226-8229.) After lengthy discussion, the trial court ruled that seven members of the Gaines family could testify. (31 RT 8257-8258.) Ultimately five members of the Gaines family testified: Jeff Gaines, Sally Gaines, Larry Gaines, William Gaines, and Mary Gaines. (33 RT 8594-8662.)

In 1991, the U.S. Supreme Court overruled its previous decision in *Booth v. Maryland* (1987) 482 U.S. 49, and held that the Eighth Amendment does not preclude a state from allowing victim impact evidence and statements. (*Payne v. Tennessee* (1991) 501 U.S. 808.) In *Payne*, a mother and her three-year-old daughter were killed with a butcher knife in the presence of the mother's two-year-old son, who survived critical injuries suffered in the attack by defendant. The prosecution presented the testimony of one victim impact witness, the boy's grandmother, who testified that the boy missed his mother and sister. (*Id.* at pp. 808, 816.) According to the court, "victim impact evidence serves entirely legitimate purposes," for it enables the jury to have before it all information necessary to a determination of punishment." (*Id.* at p. 825.)

*Payne* recognized the right of the defendant to rebut victim impact evidence. (*Payne*, *supra*, 501 U.S. at p. 825.) The state does not have free rein to introduce anything or everything about the victim; *Payne* suggests that the state can only present "a glimpse of the life" of the victim. (*Id.* at p. 822 (citation omitted); see also *Id.* at p. 830 (conc. opn. of O'Connor, J.).)

*Payne* left undisturbed *Booth*'s prohibition against the victim's family offering its opinion about the crime, the defendant, and the

appropriate punishment. (*Payne*, *supra*, 501 U.S. at p. 830, n.2.) Furthermore, the court recognized that victim impact statements or evidence may potentially render the sentencing proceeding fundamentally unfair. (*Id.* at p. 825; *Id.* at p. 831 (conc. opn. of O'Connor, J.); *Id.* at p. 836 (conc. opn. of Souter, J.).)

Appellant believes that this Court's interpretations of *Payne* have unreasonably expanded its holding, and have allowed so many peripheral witnesses to testify regarding the impact of the victim' loss as to overwhelm a defendant's mitigating evidence. (See, e.g., *People v. Taylor* (2010) 47 Cal.4th 574, 646 ["Our prior decisions recognize that, under *Payne*, constitutionally permissible victim impact evidence includes reference "'to the status of the victim, and the effect of [her] loss on friends, loved ones, and the community as a whole.' [citations omitted]."].)

The Eighth Amendment's requirement that penalty determinations be a "reasoned moral response" should have led the trial court to limit victim impact testimony to at most both William and Mary Gaines, who were close by when the crime was committed.

In sum, the trial court erred in admitting the prosecution's proffered victim impact evidence because it far surpassed the boundaries of evidence properly admitted under section 190.3(a)'s "circumstances of the crime"

provision. The trial court's error not only violated state evidentiary rules requiring the admission of only relevant evidence, but it also violated appellant's state and federal constitutional guarantees to due process of law and a reliable penalty determination. (U.S. Const., 5th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17, 24.)

Members of the Gaines family were present throughout the trial. To allow member after member of a locally prominent family to testify about their loss skews attention away from the person on trial for his life, and unduly prejudiced appellant's jury — particularly in light of the trial court's refusal to allow members of appellant's family to testify about the impact on them of appellant's execution. (See Argument XIII, *post.*) For this reason, his death sentence should be set aside.

## XIII. WHERE THE STATE RELIES ON THE IMPACT OF A MURDER IN ASKING FOR DEATH, THE DEFENDANT SHOULD BE PERMITTED TO RELY ON THE IMPACT OF AN EXECUTION IN ASKING FOR LIFE.

### A. The Error

Trial counsel submitted proposed penalty phase instructions, including Proposed Instruction No. 8, sought to direct the jury in how to consider evidence of the impact of the crime on the victim's family. (7 CT 1843.) After discussion, the trial court rejected the instruction, primarily on grounds that it was duplicative. (35 RT 9279-9282.) The trial court then stated it would be giving CALJIC No. 8.85, with its language that the jury could not consider the impact of appellant's execution on his family.

Trial counsel objected, saying it was directly contrary to his Proposed Instruction No. 8 and created a serious inconsistency. Counsel's objection was overruled. (35 RT 9798-9801.) The trial court instructed the jury that "[s]ympathy for the family of the defendant is not a matter that you may — that you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character." (36 RT 9546-9547.)

Failure to allow the jury to consider the impact of appellant's execution on his extended family violated well-settled principles of the

Eighth and Fourteenth Amendments to the United States Constitution, and render his trial fundamentally unfair.

The U.S. Supreme Court has long held that a state may not preclude the sentencer in a capital case from considering *any* relevant evidence in support of a sentence less than death. Over 60 years ago, the high court recognized that:

> [H]ighly relevant — if not essential — to a [sentencer's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts of individualized punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

(*Williams v. New York* (1949) 337 U.S. 241, 257; see also *Skipper v. South Carolina* (1986) 476 U.S. 1; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *McCleskey v. Kemp* (1987) 481 U.S. 279, 306: "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty"; and *Payne v. Tennessee*, *supra*, 501 U.S. at p. 809: "[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce. . . ."

It was precisely because of the broad latitude afforded capital defendants that the Supreme Court reversed its opposition to victim impact

evidence and held that "evidence about . . . the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Payne*, *supra*, 501 U.S. at p. 826.) The underlying premise of the majority decision in *Payne* is that the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state. (*Id.* at pp. 820-826.)

In his concurring opinion, Justice Scalia explicitly noted that since the Eighth Amendment required the admission of all mitigating evidence on the defendant's behalf, it could not preclude victim impact evidence because "the Eighth Amendment permits parity between mitigating and aggravating factors." (*Payne*, *supra*, 501 U.S. at p. 833.) The *Payne* majority explained that the impact of the victim's death on his surviving family members was essential for the jury to understand the victim's "uniqueness as an individual human being." (*Id.* at p. 823; accord *id.* at p. 831 [conc. opn. of O'Connor, J.] and pp. 835, 837 [Souter, J.].)

*Payne* explained that the Court's broad rulings requiring admission of "any mitigating evidence" were also premised on the need to ensure the jury understood the *defendant* as a "uniquely individual human being." (*Payne*, *supra*, 501 U.S. at p. 822.) The high court has ruled that the impact

of a victim's death on the victim's family is essential for the jury to understand the *victim* as a unique human being; it follows that the impact of the defendant's death on his own family is equally essential for the jury to understand the *defendant's* uniqueness as a human being. The Supreme Court's Eighth Amendment jurisprudence has long recognized that evidence showing the defendant's uniqueness as a human being may not be excluded from a capital penalty phase. (See, e.g., *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605; *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110.)

Courts throughout the country have recognized that a defendant's execution impact evidence is relevant to the sentencing decision. (See, e.g., *State v. Mann* (Ariz. 1997) 934 P.2d 784, 795 [noting mitigating evidence of "the effect on [defendant's children] if he were executed"]; *State v. Simmons* (Mo. 1997) 944 S.W.2d 165, 187 [noting mitigating evidence that defendant's "death at the hands of the state would injure his family"]; *State v. Rhines* (S.D. 1996) 548 N.W.2d 415, 446-447 [noting mitigating evidence of "the negative effect [defendant's] death would have on his family]; *State v. Benn* (Wash. 1993) 845 P.2d 289, 316 [noting mitigating evidence of "the loss to his loved ones if he were sentenced to death"]; *State v. Stevens* (Ore. 1994) 879 P.2d 162, 167-168 [concluding that the Supreme Court's mandate for unfettered consideration of mitigating

circumstances required consideration of the impact of an execution on the defendant's family]; *Lawrie v. State* (Del. 1993) 643 A.2d 1336, 1339 [noting that defendant's "execution would have a substantially adverse impact on his seven-year-old son . . . and on [defendant's] mother"]; *Richmond v. Rackets* (D. Ariz. 1986) 640 F.Supp. 767, 792 [noting trial court's consideration of testimony relating "the impact of the execution" on defendant's family], revd. on other grounds, *Richmond v. Lewis* (1992) 506 U.S. 50; compare *State v. Wessinger* (La. 1999) 736 So.2d 162, 192 [rejecting defendant's argument that an instruction precluded the jury from considering the impact of a death sentence on the defendant's family].)

Not only does the Eighth Amendment guarantee appellant the right to place any mitigating evidence before the jury, but in the context of this case, where several members of the victim's family described for the jury the impact of his loss on them, principles of equal protection and fundamental fairness also require that appellant be afforded the same opportunity to present evidence of the pain and loss his execution would cause members of his family. (*Wardius v. Oregon* (1973) 412 U.S. 470.) Failure to allow appellant to also put forward such evidence trivializes the impact his loss would have on his family, and skews the moral and normative the jury was asked to make toward the imposition of death.

In light of *Payne v. Tennessee*, *supra*, and these other authorities from around the country, the jury in this case should have been permitted to consider the impact of a potential death sentence on appellant's family. Aside from David Zaragoza, appellant's brothers and sisters were hard-working and valuable members of the Stockton community, who had children of their own with whom appellant had spent time. As the trial court noted, appellant loved his family, and they loved him. (37 RT 9808.)

The impact of appellant's death on his surviving family would have been a powerful way of showing defendant's "uniqueness as an individual human being." The articulated rationale of *Payne* — that there should be *parity* between the type of evidence available to the state and the defendant at the sentencing phase of a capital case — compels a conclusion that appellant's family should have been allowed to testify as to the impact of appellant's execution on them.

This result is especially appropriate in a case like this, where the state relies on *Payne* to introduce highly emotional testimony about the impact of the crime on the victim's extended family. When the state introduces such testimony, the "parity" concerns of *Payne* are strongly implicated. Appellant should have been permitted to use sentence impact evidence as a counterweight.

Practical concerns support such an approach. In the area of victim impact, the reality is that more traditional methods of ensuring the reliability of testimony — such as cross-examination — are simply not feasible. (See *Booth v. Maryland*, *supra*, 482 U.S. at p. 506 [noting that it would be "impossible" to use cross-examination to rebut victim impact evidence].) Since cross-examination cannot realistically serve to balance the scale when victim impact evidence is presented, it is only fair that sentence impact evidence be allowed.

Appellant recognizes that this Court has on several occasions rejected arguments that the federal constitution required consideration of sentence impact. (See, e.g., *People v. Bennett* (2009) 45 Cal.4th 577, 600-602; *People v. Ochoa* (1998) 19 Cal.4th 353, 454-456; *People v. Smithey* (1999) 20 Cal.4th 936, 999-1000; *People v. Smith* (2005) 35 Cal.4th 334, 366-367.) The trial in *Ochoa* occurred before *Payne v. Tennessee* had overruled *Booth v. Maryland*. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 873, n.21.) Thus, the jury in that case was not permitted to consider "sympathy for the victim or his family." (19 Cal.4th at p. 873, n.21.) As a consequence, the parity concerns of Payne were not present.[43]

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[43] The text of *Smithey* does not reveal whether it too was a pre-*Payne* trial. An examination of the record in *Smithey* shows that the jury returned a verdict of death on June 22, 1989. (*People v. Smithey*, No. S011206, CT

But just as plainly, these parity concerns *are* implicated in this case. Here, in contrast to *Ochoa*, *Bennett* and *Smithey*, the prosecutor *did* rely on victim impact evidence in asking for death. If victim impact is admissible to show the victim as a unique human being, and if *Payne*'s concern with parity is to mean anything, appellant should have been allowed to show his uniqueness as a human being by introducing sentence impact evidence in asking for life.

In addition, not only did the trials in *Ochoa* and *Smithey* pre-date *Payne*, but the appellate opinions in those cases all pre-dated a series of United States Supreme Court cases emphasizing the "low threshold for relevance" imposed by the Eighth Amendment. (*Smith v. Texas* (2004) 543 U.S. 37, 43; *Tennard v. Dretke* (2004) 542 U.S. 274, 285.) As these cases recognize, the Eighth Amendment does not permit a state to exclude evidence which "might serve as a basis for a sentence less than death." (*Smith v. Texas*, *supra*, 543 U.S. at p. 43.) So long as a "fact-finder could reasonably deem" the evidence to have mitigating value, a state may not preclude the defendant from presenting that evidence. (*Id.* at p. 44.)

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1117-1118, 1120, 1150.) *Payne* was decided on June 27, 1991. Thus, *Smithey* too was a pre-*Payne* case and the parity concerns of *Payne* were not present.

Execution impact evidence is plainly relevant under *Smith* and *Tennard*. As the Supreme Court has concluded, victim impact evidence is relevant because it shows the "uniqueness" of the victim. For the very same reasons, execution impact evidence is relevant because it shows the uniqueness of the defendant. This evidence satisfies the "low threshold for relevance" precisely because a juror deciding whether appellant should live or die "could reasonably deem" the evidence to have *mitigating value*.

In *People v. Bennett*, this Court sustained the trial court's refusal to have an expert testify regarding the impact the defendant's execution would have on his children, and relied on its previous reasoning in *Ochoa*. (*Bennett*, *supra*, 45 Cal.4th at pp. 600-601.) The basis was a distinction between the evidence that the defendant is loved by his family, and the impact that his death would have upon them; "The former constitutes permissible indirect evidence of a defendant's character while the latter improperly asks the jury to spare the defendant's life because it 'believes that the impact of the execution would be devastating to other members of the defendant's family.'" (*Id.* at p. 601.)

In *Bennett*, this Court rejected the contention that because the prosecution could present victim impact evidence, appellant should be permitted to introduce execution impact evidence, by not directly

addressing the issue of parity. The Court simply stated that the only permissible mitigation evidence is that which deals with the defendant's own circumstances, not those of his family. (*Bennett*, *supra*, 45 Cal.4th at p. 602.) This distinction is artificial. The impact of a defendant's execution on his family is a "circumstance of the crime" in every sense that the impact of the victim's loss on the victim's family registers.

In asking the Supreme Court to overrule *Booth* and admit victim impact testimony, the Attorney General of California formally took the position that "[i]f the death penalty is constitutional, as the Court has repeatedly held, it cannot be unconstitutional to permit the pros and cons in the particular case to be heard." (*Payne v. Tennessee*, No. 90-5721, Brief of Amicus Curiae, State of California at p. 10, 1991 WL 11007883 at p. 13.) Just as victim impact evidence represents one of the "pros" in a particular case, the devastating impact of an execution on the family of a defendant is one of the "cons."

The privileging of the Gaines family and their loss has every appearance of racial prejudice. The courts have and must continue to "engage[] in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." (*McCleskey v. Kemp*, *supra*, 481 U.S. at p. 309, quoting *Batson v. Kentucky*, *supra*, 476 U.S. at p. 85.) "[D]iscrimination on

the basis of race, odious in all respects, is especially pernicious in the administration of justice." (*United States v. Doe* (D.C. Cir. 1990) 903 F.2d 16, 21.) In *Turner v. Murray* (1986) 476 U.S. 28, the Supreme Court held that a capital defendant accused of an interracial crime is entitled to voir dire on the issue of racial prejudice because the "range of discretion entrusted to a jury in a capital sentencing hearing" provides "a unique opportunity for racial prejudice to operate but remain undetected." (*Turner v. Murray*, 476 U.S. at p. 35.) The valuation of a White life over a Brown life is implicit when several family members of the former are allowed to testify in poignant detail about the impact on them of the loss of their loved one, but not family members of the latter.

Although there is no parity in the behavior of the victim and the defendant, both families suffered a wrenching loss. It is fundamentally unfair, and a violation of the Eighth and Fourteenth Amendments to the United States Constitution to diminish an execution's impact by refusing to allow testimony from those who would be most affected by it, while allowing five members of the victim's family to testify about the meaning of their loss.

> From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any

> decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

(*Gardner v. Florida*, *supra*, 430 U.S. at pp. 357-358.)

Appellant lived in each member of his family. Refusal to allow him to present his sentencing jury with the full impact on them of a vote for death deprived him of his constitutional right to present any evidence in mitigation that might have moved one juror to vote for a sentence of less than death.

**B. Prejudice**

Capital defendants have a constitutional right to present to the sentencer any mitigating evidence demonstrating the appropriateness of a penalty less than death. (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 5; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) They have a corollary right to have the sentencer consider the mitigating evidence under instructions which permit the sentencer to give a reasoned, moral response to the mitigating evidence. (*Penry v. Lynaugh*, *supra*, 492 U.S. at pp. 319-320; *Eddings v. Oklahoma*, *supra*, 455 U.S. at pp. 113-114; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.)

Errors of this type require a new penalty phase unless the state can prove them harmless beyond a reasonable doubt. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1117.) Here, the state will be unable to carry this burden.

This was not a case bereft of mitigation. As the prosecutor recognized, appellant was loved by his family.[44] The jurors deliberated over 20 hours, over a span of four days. (Statement of the Case, *ante*.) As is the case with victim impact evidence, sentence impact evidence is a particularly powerful type of evidence and argument. On the record of this case, the exclusion of this mitigating evidence from the defense side of the scale cannot be deemed harmless. A new penalty phase is required.

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[44] MR HIMELBLAU: . . . Louis Zaragoza for whatever reason — and I don't know; I don't know him — has a certain place in his family's heart. I think that Louis Zaragoza is well loved by his family. I mean that genuinely.

THE COURT: In the good sense.

MR. HIMELBLAU: In the good sense.

(23 RT 5839.)

## XIV. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6.)[45] See also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while

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[45] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating

comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime — even circumstances squarely opposed to each other (e.g., the fact that the

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circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at p. 178.)

victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) — to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute — but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

## XV. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE IT PROVIDES NO MEANINGFUL BASIS FOR CHOOSING THOSE WHO ARE ELIGIBLE FOR DEATH.

"To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.'" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citations omitted.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 31 special circumstances[46] purporting

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[46] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow

to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs

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and is now 34.

Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

## XVI. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE IT ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[47] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three

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[47] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also modification of CALJIC No. 8.88, read to the jury at 36 RT 9549-9550.)

weeks after the crime,[48] or having had a "hatred of religion,"[49] or threatened witnesses after his arrest,[50] or disposed of the victim's body in a manner that precluded its recovery.[51] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.) Relevant "victims" include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm they describe may properly "encompass[] the spectrum of human responses" (*ibid.*), and such evidence may dominate the penalty proceedings (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783).

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and

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[48] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, cert. den. (1990) 494 U.S. 1038.

[49] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, cert. den. (1992) 112 S.Ct. 3040.

[50] *People v. Hardy* (1992) 2 Cal.4th 86, 204, cert. den. 113 S.Ct. 498.

[51] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, cert. den. (1990) 496 U.S. 931.

contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts — or facts that are inevitable variations of every homicide — into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of

any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

## XVII. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3, factor (a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral"

and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make — whether or not to condemn a fellow human to death.

### A. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors. . . ." But this pronouncement has been squarely rejected

by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [*Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [*Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi*, *supra*, at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring*, *supra*, 536 U.S. at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring*, *supra*, at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when

it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (542 U.S. at 304; emphasis in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices

split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 543 U.S. at p. 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra*, 549 U.S. at p. 274.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (*Id.* at p. 282.)

## B. In the Wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance — and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[52] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th

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[52] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also — and most important — to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

107, 177), which was read to appellant's jury (36 RT 9549-9550), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*"

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[53] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[54]

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[53] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt.'" (*Johnson, supra*, 59 P.3d at p. 460.)

[54] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at p. 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[55] In *Cunningham* the principle that any fact which exposed a

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[55] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the

defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (549 U.S. at pp. 276-279.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham*, *supra*, 549 U.S. at pp. 290-291.)

*Cunningham* then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (549 U.S. at p. 293.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room

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constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at p. 1253; *Cunningham, supra,* 549 U.S. at p. 289.)

> for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra,* 549 U.S. at pp. 291.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see § 190.2, subd. (a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subdivision (a)[56] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts — whether related to the offense or the offender — beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. 279.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

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[56] Section 190, subdivision (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at p. 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604.) Section 190, subdivision (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (§ 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (§ 190.3; CALJIC No. 8.88, 7 CT 1884-1885, 36 RT 9549-9550.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a

reasonable doubt." (*Ring*, 536 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely*, *supra*, 542 U.S. at p. 328; emphasis in original.)

The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

### C. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the

aggravating factors substantially outweigh the mitigating factors — a prerequisite to imposition of the death sentence — is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State*, *supra*, 59 P.3d 450.)[57]

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[58] As the high court stated in *Ring*:

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[57] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala. L.Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[58] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, and *Addington v. Texas* (1979) 441 U.S. 418, 423-424.)

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring*, *supra*, 536 U.S. at p. 609.)

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

### D. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

#### 1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are

determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

## 2. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas*, *supra*, 441 U.S. at p. 423; *Santosky v. Kramer*, *supra*, 455 U.S. at p. 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Ca1.3d 306 [same]; *People v. Thomas* (1977) 19 Ca1.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional

> requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant,

otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri*, *supra*, 451 U.S. at p. 441, and *Addington v. Texas*, *supra*, 441 U.S. at pp. 423-424.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

### E. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 539, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at

p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some

knowledge of the reasons therefor." (*Id.* at p. 267.)[59] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (§ 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*; Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v.*

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[59] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Cal. Code Regs., tit. 15, § 2280 et seq.)

*Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh*, *supra*, 548 U.S. at pp. 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

## F. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Intercase Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review — a procedural safeguard this Court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. at p. 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-

review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*, 548 U.S. at pp. 177-178), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.)

The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in intercase proportionality review now violates the Eighth Amendment.

### G. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If it Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 SWAT 945.)

The U.S. Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made

beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury.

Appellant's jury was not instructed on the need for such a unanimous finding on these facts, nor is such an instruction generally provided for under California's sentencing scheme. This failure violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

### H. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as a Barrier to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

### I. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" — factors (d), (e), (f), (g), (h), and (j) — were relevant

solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1034.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280 at p. 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors.

> (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Morrison, supra*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, it is evident that a reasonable juror could make the same mistake. Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[60]

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[60] See also *People v. Cruz* (2008) 44 Cal.4th 636, 681-682 [noting appellant's claim that "a portion of one juror's notes, made part of the augmented clerk's transcript on appeal, reflects that the juror did 'aggravate [ ] his sentence upon the basis of what were, as a matter of state law, mitigating factors, and did so believing that the State—as represented by the trial court [through the giving of CALJIC No. 8.85]—had identified them as potentially aggravating factors supporting a sentence of death'"; no ruling on merits of claim because the notes "cannot serve to impeach the jury's verdict"].

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest — the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) — and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State — as represented by the trial court — had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of CALJIC No. 8.85, the pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

## XVIII. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without

showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[61] as in *Snow*,[62] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person

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[61] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto, supra*, 30 Cal.4th at p. 275; emphasis added.)

[62] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow, supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge makes a sentencing choice in a non-capital case, the court's "reasons ... must be stated orally on the record." (Cal. Rules of Court, rule 4.42(e).)

In a capital sentencing context, by contrast, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against

persons subject to loss of life; they violate equal protection of the laws.[63] (*Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 530].)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421; *Ring v. Arizona*, *supra*.)

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[63] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

## XIX. THE VIOLATIONS OF APPELLANT'S RIGHTS ARTICULATED ABOVE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT MR. ZARAGOZA'S CONVICTIONS AND PENALTY BE SET ASIDE.

### A. Introduction

Mr. Zaragoza was deprived of a fair trial and a reliable penalty in violation of customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. Moreover, the death penalty, as applied in the United States and the State of California, violates customary international law as evidenced by the equal protection provisions of the above-mentioned instruments as well as the International Convention Against All Forms of Racial Discrimination.

International law sets forth minimum standards of human rights that must be followed by states that have signed treaties, accepted covenants, or otherwise accepted the applicability of these standards to their own citizens. This Court has not only the right, but the obligation, to enforce these standards.

### B. Background

International law "confers fundamental rights upon all people vis-a-vis their own governments." (*Filartiga v. Pena-Irala* (2nd Cir. 1980) 630

F.2d 876, 885.) International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252; *Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64.)

The first modern international human rights provisions appear in the United Nations Charter, which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[64] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

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[64] Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force October 24, 1945.

In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere — without regard to race, language or religion — we cannot have permanent peace and security in the world.

Robertson, Human Rights in Europe (1985) p. 22, n.22 (quoting President Truman).

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights (Universal Declaration)[65] and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[66] The Universal Declaration is part of the International Bill of Human Rights,[67] which also includes the International Covenant on Civil and Political Rights (International Covenant),[68] the Optional Protocol to the International Covenant,[69] the International Covenant on Economic, Social and Cultural Rights,[70] and the human rights provisions of the UN Charter.

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[65] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization.

[66] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951. Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Burgenthal, *International Human Rights in a Nutshell*, Vol. 14 (1988) p. 48

[67] See generally, Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.

[68] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976.

[69] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[70] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

The United States and our Bill of Rights was the inspiration of international human rights law. Our government has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As a key participant in drafting the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[71] In the late 1960s and throughout the 1970s, the United States became a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[72]

In the 1990s, the United States ratified three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination (Race Convention),[73] and the International

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[71] Sohn and Burgenthal, *International Protection of Human Rights* (1973) pp. 506-509.

[72] Burgenthal, *International Human Rights*, *supra*, p. 230.

[73] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[74] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[75]

The United States, by signing and ratifying the International Covenant, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. Many of the substantive clauses of these

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October 20, 1994. 60 U.N.T.S. 195 (1994).

More than 100 countries are parties to the Race Convention.

[74] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. 1465 U.N.T.S. 85 (1994).

[75] Burgenthal, *International Human Rights*, *supra*, p.4.

treaties articulate customary international law and thus bind our government.[76]

Safeguards adopted by international organizations are also indicative of customary international law. The Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty adopted by the United Nations Economic and Social Council provides, "[c]apital punishment may only be carried out pursuant to *a final judgement by a competent court after legal process which gives all possible safeguards to ensure a fair trial . . .* including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings." (emphasis added).

This Court has repeatedly rejected claims that international law has any application to California capital proceedings, on grounds that it does not prohibit a sentence in accord with state and federal constitutional requirements. (*People v. Hamilton* (2009) 45 Cal.4th 863, 896; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055.) To the extent that this Court has concluded that international law need not be considered as long as standards of domestic law are met,

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[76] Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731, 737.

then the opinion in *Jenkins* and ensuing cases (see, e.g., *People v. Curl* · (2009) 46 Cal.4th 339, 362-363), effectively relegates international legal principles to the trash can, holding that international law is no broader than the law of a sovereign state. If this were the case, then every nation on earth could claim that international law is only binding to the extent it reiterates domestic law.

As the United States Constitution and Supreme Court jurisprudence recognize, international law is part of the law of this land. International treaties have supremacy in this country. (U.S. Const., art. VI, § 2.) Customary international law, or the "law of nations," is equated with federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058; see *Eye v. Robertson* (1884) 112 U.S. 580; U.S. Const. art. I, § 8 (Congress has authority to "define and punish . . . offenses against the law of nations").) This Court therefore has an obligation to fully consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law. Most particularly, it should enforce violations of international law where that law provides more protections for individuals than does domestic law.

## XX. THE RACIAL DISCRIMINATION THAT PERMEATES CAPITAL SENTENCING THAT IS EXPLICITLY ACCEPTED BY DOMESTIC LAW VIOLATES BINDING INTERNATIONAL LAW, AND REQUIRES THAT MR. ZARAGOZA'S DEATH PENALTY BE SET ASIDE.

There is one area of law in which international law reaches further than domestic law: race discrimination. Appellant is aware of this Court's language that a defendant "does not have to turn to international law for protection from racial discrimination. Both the state and federal Constitutions and various statutory provisions prohibit the state from engaging in racial discrimination." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.)

A closer look, however, shows that racism is both implicitly and explicitly accepted in the context of the death penalty, primarily as an inevitable byproduct of a system in which discretion is a key component. Because the death penalty is in fact imposed in the United States in a racially discriminatory manner, international law, as evidenced by the International Covenant, the American Declaration, and the Race Convention, all of which are subscribed to by the United States, prohibits its application to appellant, a man of Hispanic background.

Article 26 of the International Covenant provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the

equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex. . . ."[77] Again, this protection is found in article 2 of the American Declaration which guarantees the right of equality before the law.[78]

The Race Convention, a signed and recently ratified treaty, contains extensive protections against racial discrimination. Article 5 of the Convention provides:

> [S]tates Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution. . . .[79]

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[77] International Covenant on Civil and Political Rights, *supra*.

[78] American Declaration of the Rights and Duties of Man, *supra*.

[79] International Convention Against All Forms of Racial Discrimination, *supra*. Indeed, long before this Convention, the United States recognized the international obligations to cease state practices that discriminated on the basis of race. See also *Oyama v. California* (1948) 332 U.S. 633, holding that the California Alien Land Law preventing an alien ineligible for citizenship from obtaining land violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion, stated that the UN Charter was a federal law that outlawed racial

Furthermore, "States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention. . . ."[80]

Section 702 of the Restatement Third of the Foreign Relations Law of the United States recognizes that a state violates international law if, as a matter of state policy, it practices, encourages or condones systematic racial

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discrimination and noted:

> Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

(*Id.* at p. 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, invalidating an Oregon Alien Land Law, and stating that:

> The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed . . . When our nation signed the Charter of the United Nations we thereby became bound to the following principles (article 55, subd. c, and see article 56): "Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." (59 Stat. 1031, 1046.)

(*Id.* at p. 604.)

[80] International Convention Against All Forms of Racial Discrimination, *supra*.

discrimination. The right to be free from governmental discrimination on the basis of race is so universally accepted by nations that it constitutes a peremptory norm of international law, or *jus cogens*.[81] As such, the courts ought to consider and weigh the *jus cogens* quality of international norms; if of *jus cogens* quality, these norms should have a stronger influence against, and increase the burden of justification for, contrary state actions.[82] (See, e.g., *Kadic v. Karadzic* (2nd Cir. 1995) 70 F.3d 232, 238 (prohibition against torture has gained status as *jus cogens* because of widespread condemnation of practice).)

The death penalty in the United States has long been imposed in a racially discriminatory manner. The 1990 report of the United States General Accounting Office synthesized 28 studies and concluded that there is a "pattern of evidence indicating racial disparities in the charging,

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[81] A peremptory norm of international law, *jus cogens*, is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512; Restatement Third of the Foreign Relations Law, *supra.*)

[82] Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society* (1988) 28 Va. J. Int'l L. at 627-628.

sentencing, and imposition of the death penalty after the *Furman* decision.[83] In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., "those who murdered whites were found more likely to be sentenced to death than those who murdered blacks."[84] The GAO report noted that racism was "found at all stages of the criminal justice system process."[85]

The Baldus study, an empirical analysis accounting for 230 non-racial variables, also found strong evidence of racial bias. The study concluded that killers of whites in Georgia are 4.3 times more likely to be sentenced to death than killers of blacks.[86] Professor Baldus, along with

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[83] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) GAO/GGD-90-57. (In *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726, the United States Supreme Court held that Georgia and Texas state statutes governing the imposition and carrying out of the death penalty violated the Eighth and Fourteenth Amendments of the Constitution.)

[84] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) *supra*, at p. 5.

[85] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing*, *supra*, p. 6.

[86] Baldus, Woodworth, Zuckerman, Weiner & Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*

statistician George Woodworth, also conducted a study of race and the death penalty in Philadelphia in 1996–1998. They examined a large sample of murders eligible for the death penalty between 1983 and 1993. They found that, even after controlling for levels of crime severity and the defendant's criminal background, blacks in Philadelphia were 3.9 times more likely to receive a death sentence than other similarly situated defendants.[87]

In 1994, a Staff Report by the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary concluded that "racial minorities are being prosecuted under federal death penalty law far beyond their proportion in the general population or the proposition of criminal offenders."[88] The report analyzed the application of specific provisions of the Anti-Drug Abuse Act of 1988 (also known as the "drug kingpin law"), which authorize the death penalty for murders committed by those involved in certain drug trafficking activities, to criminal defendants.

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(1998) 83 Cornell L.Rev. 1638.

[87] *Ibid.*

[88] *Racial Disparities in Federal Death Penalty Prosecutions 1988-1994*, Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, 103 Cong. 2nd Sess., March 1994.

Significantly, the staff report found that while three-quarters of those convicted under the provisions of the Anti-Drug Abuse Act have been white and only 24 percent of the defendants have been black, just the opposite is true for those chosen for death penalty prosecutions: 78 percent of the defendants have been black and only 11 percent of the defendants have been white.[89] This contrasts sharply with the statistics of federal death penalty prosecutions before the 1972 *Furman* decision: between 1930 and 1972, 85 percent of those executed under federal law were white and 9 percent were black.[90] Looking at this information, the staff report concluded that the "dramatic racial turnaround under the drug kingpin law clearly requires remedial action."[91]

The staff report also stated that

> Nearly 40% of those executed since 1976 have been black, even though blacks constitute only 12% of the population. And in almost every death penalty case, the race of the victim is white. Last year alone, 89% of the death sentences carried out involved white victims, even though 50% of the homicides in this country have black victims. Of the 229 executions that have occurred since the death penalty was

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[89] *Ibid.*

[90] *Ibid.*

[91] *Ibid.*

> reinstated, only one has involved a white defendant for the murder of a black person.[92]

These statistics led the staff report to conclude that "Race continues to plague the application of the death penalty in the United States."[93]

In 1995, researchers at the University of Louisville found that blacks convicted for killing whites were more likely to receive the death penalty than any other offender-victim combination.[94] In fact, in 1996 "100% of the inmates [on Kentucky's death row] were there for murdering a white victim, and none were there for the murder of a black victim, despite the fact that there have been over 1,000 African-Americans murdered in Kentucky since the death penalty was reinstated."[95] This evident bias in use of the death penalty led to Kentucky's Racial Justice Act, passed in 1998, which permits race-based challenges to prosecutorial decisions to seek the death penalty.[96] There is no equivalent in California, nor is there even a

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[92] *Ibid.*

[93] *Ibid.*

[94] Keil and Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991* (1995) 20 Am.J.Crim.Just. 17.

[95] Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, Death Penalty Information Center (June 1998).

[96] *Ibid.*

jury instruction that warns the jurors to avoid race or group prejudice in their deliberations over the appropriate penalty.

In August 2009, North Carolina passed the Racial Justice Act, becoming the second state to allow statistical evidence to show racial bias in the death penalty. In an individual case, the law allows a judge to overturn the death sentence or prevent prosecutors from seeking the death penalty if bias is shown. Governor Beverly Purdue, who signed the act into law, stated "I have always been a supporter of death penalty, but I have always believed it must be carried out fairly. The Racial Justice Act ensures that when North Carolina hands down our state's harshest punishment to our most heinous criminals — the decision is based on the facts and the law, not racial prejudice." (*Perdue signs Racial Justice Act* (Aug. 11, 2009) WRAL <http://www.wral.com/news/state/story/5769609/> [as of Dec. 12, 2010].)

A recent study in North Carolina found that the odds of a defendant receiving a death sentence were three times higher if the person was convicted of killing a white person than if he had killed a black person. The study, conducted by Professors Michael Radelet and Glenn Pierce, examined 15,281 homicides in the state between 1980 and 2007, which resulted in 368 death sentences. Even after accounting for additional

factors, such as multiple victims or homicides accompanied with a rape, robbery or other felony, researchers found that race was still a significant predictor of who was sentenced to death. The study will be published in the North Carolina Law Review. (M. Burns (Ed.) *Study: Race plays role in N.C. death penalty* (July 22, 2010) WRAL <http://www.wral.com/news/local/story/8017956/> [as of Dec. 12, 2010].)

Although roundly condemned in the abstract, racism permeates our criminal justice system. Its persistence is encouraged by the requirement that it be photographed or documented before any court will act to condemn it. In *McCleskey v. Kemp*, *supra*, 481 U.S. 279, the U.S. Supreme Court rejected a federal Equal Protection challenge to a Georgia death sentence which was shown by statistical evidence to have been imposed pursuant to a statewide pattern of racially disproportionate capital sentencing.

Starting from the premise that the federal Equal Protection Clause is concerned only with state action consisting of purposeful discrimination by official decision-makers, the *McCleskey* majority opinion first translated this principle into a requirement that, "to prevail under the Equal Protection Clause, McCleskey must prove that the decision-makers in his case acted with discriminatory purpose" (481 U.S. at p. 292) and then held that "an inference drawn from the general statistics [concerning capital sentencing

patterns] to a specific decision in a trial and sentencing is simply not comparable to" statistical proof of racial discrimination in other contexts. (*Id.* at p. 294.) Hence, the majority held, any claim that a death sentence violates the federal Equal Protection Clause must be established by case-specific proof of subjective racial animus on the part of the prosecutor, jurors, judge or legislature. (*Id.* at pp. 292-299.)

Thus, the *McCleskey* majority limited the federal Equal Protection Clause to treating "the superficial, short-lived situation where we can point to one or another specific decision-maker and show that his decisions were the product of conscious bigotry," while leaving untreated "the far more basic, more intractable, and more destructive situation where hundreds upon hundreds of different public decision-makers, acting like Georgia's prosecutors and judges and juries — without collusion and in many cases without consciousness of their own racial biases — combine to produce a pattern that bespeaks the profound prejudice of an entire population."[97]

The *McCleskey* decision was driven by a realization that racial discrimination in capital sentencing was not peculiar to Georgia, but was inevitable under any modern-day American procedure for imposing the

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[97] Amsterdam, *Race and the Death Penalty* (1988) 7 Criminal Justice Ethics 2, at p. 86.

death penalty.[98] Thus, the court saw that its only real choices were to outlaw capital punishment entirely or to tolerate racial bias in the dispensing of death sentences. It chose the latter. However legal at present in the United States, this choice clearly violates the Race Convention, and international law.

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[98] The *McCleskey* majority says repeatedly that the death penalty in the United States would be abolished de facto if the Court were to hold that a statistical showing of state-wide racially discriminatory capital-sentencing practices sufficed to invalidate death sentences imposed under those practices. (See, e.g., 481 U.S. at p. 319 ("McCleskey's wide-ranging arguments . . . basically challenge the validity of capital punishment in our multiracial society"); *id.* at pp. 312-313 ("At most, the . . . [empirical study presented by McCleskey] indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . As this Court has recognized, any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.'. . . Specifically, 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death."'"); *id.* at p. 312 n. 35 ("No one contends that all sentencing disparities can be eliminated."); *id.* at p. 315 n. 37 ("The *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment. . . . Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution. As we reiterate . . . , the requirement of heightened rationality in the imposition of capital punishment does not 'plac[e] totally unrealistic conditions on its use.'"); *id.* at p. 319 ("The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor [this is a euphemism for race — the only "factor" at issue in *McCleskey*] in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use.'"); and see *id.* at pp. 310-311.)

The discretion that is now a mandatory part of California's death penalty sentencing scheme guarantees that racism will have an opportunity to flourish throughout the process. The Supreme Court recognizes that any "process that . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" is intolerably inhumane. (*Woodson v. North Carolina*, *supra*, 426 U.S. at p. 304.) The problem with this now-constitutionally-required discretion, though, is that — as the Supreme Court was compelled to concede in *McCleskey*, 481 U.S. at p. 312 — "'the power to be lenient [also] is the power to discriminate.'"

The same reluctance to impose the death penalty regularly which had put an end to mandatory capital sentencing sways jurors, and often prosecutors as well, to forgo the extreme punishment of death unless their outrage at a crime overwhelms their empathy for the defendant. Neither outrage nor empathy are dispassionate, rational processes. They are impressionistic and impulsive and are strongly moved by racial, caste, and class biases. Capital sentencing procedures conferring broad discretion on prosecutors to seek and jurors to choose a death sentence provide "a unique opportunity for racial prejudice" (*Turner v. Murray*, *supra*, 476 U.S. at p. 35) to operate in ways that courts cannot, and do not, effectively restrain.

This Court has explicitly allowed racism to be part of the process of exercising peremptory challenges of potential jurors, provided that it is not the only reason for such challenges. In *People v. Montiel* (1993) 5 Cal.4th 887, the Court wrote, "To rebut a race- or group-bias challenge, counsel need only give a *nondiscriminatory* reason which, under all the circumstances, including logical relevance to the case, appears *genuine* and thus supports the conclusion that race or group prejudice *alone* was not the basis for excusing the juror. (Citations omitted.)" (*People v. Montiel*, *supra*, 5 Cal.4th at 910, fn. 9; emphases in original.)

To say that "race or group prejudice *alone*" is an impermissible basis of a peremptory challenge must mean that race bias is permissible if it is not the only basis for the exercise of a peremptory challenge. Otherwise, the word "alone" would be superfluous. It cannot have been accidentally included as part of the standard's delineation; not only do principles of judicial interpretation require us to give significance to each word, but the Court's emphasizing the word "alone" must mean that the word was an integral part of the standard's formulation — a part worth emphasizing.

Appellant can discern no other contribution of the word "alone" to this formulation than a recognition that *some* racism, or purposeful discrimination, is permissible, so long as it is not the only basis for the

exercise of a peremptory challenge. By allowing purposeful discrimination provided that it is not the sole basis for the removal of a juror, this Court institutionalizes the routine practice of racism.

This Court has not done so in other aspects of the law; elsewhere, it has recognized that destructive behavior may be motivated by various reasons in addition to race bias, and nevertheless condemned such behavior. (See *In re Sassounian* (1995) 9 Cal.4th 535, 549, fn. 11 [to satisfy national origin special circumstance, § 190.2, subd. (a)(16), killing need not have been *solely* because of victim's "nationality or country of origin"]; *In re M.S.* (1995) 10 Cal.4th 698, 716 [the words "because of" construed as found in the similarly worded statutes, §§ 422.6 and 422.7, to only require that the prohibited bias be a substantial factor in the commission of the crime].)

The language in *Montiel*, however, means that racism is permissible, provided it is not the only factor — indeed, there is nothing in this Court's pronouncements that would prevent it from being a substantial factor in the decision to excuse a potential juror. This Court continues to leave open the possibility that racist intent may coexist with permissible intent in the

exercise of peremptory challenges. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197;[99] *People v. Schmeck* (2005) 37 Cal.4th 240, 276-277.)

Race discrimination is both the most detectable symptom and the most invidious consequence of the inability to rationally regulate life-and-death sentencing choices. It has persisted unchecked under every form of post-*Furman* capital-sentencing procedure. None of the statutes upheld by *Gregg v. Georgia*, *supra*, 428 U.S. 153, and its progeny are formally sufficient to cure the *Furman* arbitrariness/discrimination problem or have come close to eliminating it. To the contrary, capital sentencing decisions under the so-called "guided discretion" type of statute sustained in *Gregg* and in effect in California have consistently been found to turn on

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[99] "But we believe that substantial evidence also supports the superior court's subsequent determination that the prosecutor made a showing of the absence of purposeful discrimination in this regard. Looking to the prospective jurors themselves, including the seven identified above, and also to the timing of the prosecutor's peremptory challenges, including the seven strikes at issue here. Our review of the record on appeal allows the following conclusion: The appearance of prohibited intent in this cause arose solely from the bare pattern of the strikes. It was dissipated by the reality of permissible intent. In making the seven strikes, the prosecutor simply sought to obtain a jury that was as favorable to his position as possible, especially as to the death penalty, regardless of the group membership of individual jurors. *We do not mean to assert that prohibited intent may not coexist with permissible intent. But, unless we indulge in speculation, we cannot say that it did so here.*" (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 197; emphasis added.)

the race of the victim and secondarily on the race of the defendant, usually in combination.

The protections of the Race Convention, International Covenant and American Declaration establish an affirmative obligation of the United States to redress racial discrimination and to proceed with vigor and deliberation to ensure that race is not a prejudicial factor in criminal prosecutions. It is incumbent upon the Court to view the application of the death penalty in this case both in light of the recent international commitments the United States has made to the protection of individuals against racial discrimination, and in acceptance of the overwhelming evidence that race discrimination is an inextricable part of our death penalty scheme. Because the death penalty as applied in California is fraught with intractable discrimination and racism, it violates international norms of *jus cogens* quality. Appellant's death sentence must be reversed.

## XXI. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The non-use of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its use as regular punishment — is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky*, *supra*, 492 U.S. at p. 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, as of January 1, 2010, the only countries in the world that have *not* abolished the death penalty in law or fact are in Asia and Africa — with the exception of the United States. (*Death Sentences and Executions 2009*: *Annex I–Abolitionist and Retentionist Countries as of 31 December 2009* (Mar. 1, 2010) Amnesty Intl. <http://www.amnesty.org/en/library/info/ACT50/001/2010/en> [as of Dec. 12, 2010].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes — as opposed to extraordinary punishment for extraordinary crimes — is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112; see Argument XIX.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[100] Categories of criminals that warrant such a

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[100] See Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence* (1995) 46 Case W. Res. L.Rev. 1, 30.

comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright*, *supra*, 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

## XXII. THE ERRORS, BOTH SINGLY AND CUMULATIVELY, OBSTRUCTED A FAIR TRIAL, AND REQUIRE REVERSAL.

Many of the errors urged in this brief are sufficiently important to justify reversal in and of themselves. However, if this Court finds more than one error, but concludes that each error, standing alone, can be deemed harmless despite the factors discussed above, then this Court must also consider the cumulative effect of the errors. (*Williams v. Taylor* (2000) 529 U.S. 362, 399; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907; *People v. Duran* (1976) 16 Cal.3d 282; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233.

Fifth, Eighth, and Fourteenth Amendment due process and reliability concerns require meaningful appellate review in capital cases. (See *Parker v. Dugger* (1991) 498 U.S. 308, 321.) Absent a consideration of the cumulative impact of errors, meaningful appellate review would not be possible.

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703

F.2d 959, 963; *People v. Hill* (1998) 17 Cal.4th 800, 844.) In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of a the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Each error is sufficiently prejudicial to warrant reversal of appellant's convictions and death sentence. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors described in this brief.

## CONCLUSION

For the foregoing reasons, the judgment against appellant must be reversed.

Dated: December 16, 2010

Respectfully submitted,

MICHAEL R. SNEDEKER
Attorney for Appellant
LOUIS RANGEL ZARAGOZA

EXHIBIT
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# Fax Cover Sheet

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## Comments

PROPOSED
INSTRUCTIONS

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SAN JOAQUIN**

| | |
|---|---|
| **The People of the State of California,** | **No. SP 076824(A)** |
| **Plaintiff,** | **PROPOSED SPECIAL JURY INSTRUCTIONS OF DEFENDANT** |
| **v.** | |
| **LOUIS RANGEL ZARAGOZA,** | **Date: 2-9-01** |
| | **Time: 1:30 PM** |
| **Defendant.** | **Dept. 22** |

The enclosed proposed special jury instructions are offered by defendant for the court's consideration and approval.

1. Proposed instruction 1= modification of CALJIC 2.01, Forecite F 2.01a, supplemented by Forecite 2.01n 6
2. Proposed instruction 2= Forecite F 4.020 c
3. Proposed instruction 3= Modification of CALJIC 2.51
4. Proposed instruction 4= Modification of CALJIC 2.71

#1 p.1

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F 2.01a

**Circumstantial Evidence:**
**Guilt vs. Innocence**

*Modify ¶ 3 of CJ 2.01 as follows [added language is capitalized; deleted language is between <<>>]:

> **Also, if the circumstantial evidence [as to any particular count] is susceptible of two reasonable interpretations, one of which points to <<the defendant's>> A FINDING OF guilt and the other to <<[his] [her] innocence>> A FINDING THAT GUILT HAS NOT BEEN PROVEN, you must adopt that interpretation which points to <<the defendant's innocence>> A FINDING THAT GUILT HAS NOT BEEN PROVEN, and reject that interpretation which points to <<[his] [her]>> A FINDING OF guilt.**

Points and Authorities

[See FORECITE F 1.00b]

Accordingly, CJ 2.01 should also be revised.

The argument advanced by FORECITE regarding the impropriety of instructing the jury in terms of the defendant's "guilt or innocence" was approved in People v. Han (2000) 78 CA4th 797, 809 [93 CR2d 139]: "We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC Committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect standing alone." [Referring to CJ 2.01.] [Original emphasis.]

However, the court held that the error was harmless: "While a trial judge would do better, we think, to give the modifications proposed here, we find no reversible error considering the instructions as a whole." (Ibid.)

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#1 p.2

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**F 2.01 n6 Limitation Of Reasonable Doubt/Burden Of Proof Principles To Circumstantial Evidence Improperly Implies That Such Principles Do Not Apply To Direct Evidence.**

In FORECITE, F 2.01 n5, it was shown that the principles embodied in CJ 2.01 and CJ 2.02 regarding burden of proof and reasonable doubt are equally applicable to both circumstantial and direct evidence. However, apart from whether there is an affirmative duty to instruct in this regard, by limiting the principles to circumstantial evidence, CJ 2.01 and CJ 2.02 improperly imply to the jurors that they do not apply to direct evidence. That is, in CJ 2.00 the jury is told that there are two types of evidence: direct and circumstantial. By then telling the jury that certain principles apply to circumstantial evidence, the jury cannot help but conclude, based on common logic, that those same principles do not apply to direct evidence. "Although the average layperson may not be familiar with the Latin phrase inclusio unius est exclusion alterius, the deductive concept is commonly understood ...." (People v. Castillo, supra, 16 C4th at 1020 [conc. opn. of Brown, J.]; see also U.S. v. Crane (9th Cir. 1992) 979 F2d 687, 690 [maxim expressio unius est exclusio alterius "is a product of logic and common sense"].) To reasonable minds, CJ 2.01 and CJ 2.02 would appear to include an intentional omission. That is how the Supreme Court reasoned in People v. Dewberry (59) 51 C2d 548, 557[334 P2d 852]:

"The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder." (See also People v. Salas (76) 58 CA3d 460, 474 [129 CR 871] [when a generally applicable instruction, such as CJ 2.02, is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Effectively, the context highlights the omission, so the jury learns that the stated principles, while applying to circumstantial evidence, do not apply to direct evidence.

In sum, CJ 2.01 and CJ 2.01 erroneously mislead the jury into deducing that the principles stated in those instructions do not apply to direct evidence.

1A

#2.

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F 4.020c

**Reasonable Interpretations Regarding Guilt Of Defendant And Third Party Must Be Resolved In Favor Of Defendant**

**If the evidence permits two reasonable interpretations, one of which points to the guilt of the defendant and the other to the guilt of _____ (name of third party), you must reject the interpretation that points to the defendant's guilt and return a verdict of not guilty.**

Points and Authorities

CJ 2.01.

See also FORECITE F 2.01 n5.

both could be guilty

#3

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F 2.51b

**Motive: Application To Third Party Suspect**

*When appropriate, modify CJ 2.51 to provide as follows [added language is capitalized]:

> **Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive IN THE DEFENDANT OR _____ [insert name of third party] _____ may tend to establish THAT PERSON'S guilt. Absence of motive IN THE DEFENDANT OR _____ [insert name of third party] _____ may tend to establish THAT PERSON'S innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.**

Points and Authorities

CJ 2.51 makes no reference to motive in connection with a specific party, but in context it clearly refers to the defendant and no one else. For example, "presence of motive" in a third party would not "tend to establish guilt" of a defendant charged at trial. Accordingly, where evidence of the guilt of a third party is presented, CJ 2.51 should be modified to allow the jury to consider the third party's motive in determining whether the third party evidence raises a reasonable doubt as to the defendant's guilt. (See FORECITE F 2.03d and F 4.020).

Failure to adequately instruct the jury upon matters relating to proof of any element of the charge and/or the prosecution's burden of proof thereon violates the defendant's state (Art. I, § 15 and § 16) and federal (6th and 14th Amendments) constitutional rights to trial by jury and due process. [See generally, FORECITE >PG VII(C).]

#4

Defendant's proposed Jury Instruction Number 4

An admission is a statement made by a defendant, which does not by itself acknowledge his guilt of the crime for which he is on trial, but which statement may tend to prove his guilt when considered with the rest of the evidence.

You are the exclusive judges as to whether or not the defendant made such an admission, and if so, whether that statement is true.

## DECLARATION OF SERVICE BY MAIL

Re: *People v. LOUIS RANGEL ZARAGOZA*, Cal. Supreme Court No. S097886; San Joaquin Co. Super Ct. No. SP076824A

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, Oregon 97214. I served a true copy of the attached

**APPELLANT'S OPENING BRIEF**

on each of the following, by placing same in an envelope (or envelopes) addressed as follows:

Clerk, Criminal Appeals
San Joaquin County Superior Court
222 E. Weber Ave.
Stockton, CA 95202

Dorothy Streutker, Esq.
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101 Second Street, Suite 600
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San Quentin, CA 94974

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222 E. Weber Ave., #202
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Each said envelope was then, on December 17, 2010, sealed and deposited in the United States mail at Portland, Oregon, Multnomah County, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 17, 2010, in Portland, Oregon.

_____
JOVANA ANDERSON

## CERTIFICATE OF WORD COUNT

After conducting a word count on this opening brief, I have determined there are a total of 59,697 words in a Times New Roman 13 point font.

DATED: _____

Respectfully submitted,

_____
MICHAEL R. SNEDEKER

Attorney for Appellant
LOUIS RANGEL ZARAGOZA